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A

Treatise on the Law of

VENDOR AND PURCHASER

OF

REAL ESTATE AND CHATELS REAL,

INTENDED FOR THE USE OF

CONVEYANCERS

OF EITHER BRANCH OF THE PROFESSION.

BY

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PREFACE
TO THE SECOND VOLUME
OF THE SECOND EDITION.

IN this volume the principal additions to the original text are the statement and discussion of the effect of the Married Women's Property Act, 1907, s. 1, and the account of married women's powers under the Settled Land Acts (pp. 922—925); the statements in note (*p*) to p. 947, as to superfluous lands; that on p. 949, as to the user of corporate lands acquired under statute for particular purposes; note (*r*) to p. 963, and the subsequent text and notes on that page and p. 964, combating the doctrine that corporate lands revert to the grantor and do not escheat upon the dissolution of the corporation, and criticising the decision of Darling and Phillimore, JJ., in *Hastings Corporation v. Letton* (*a*); the further statements and notes (*a*) to (*e*) on p. 966, on the effect of the dissolution of a corporation; the paragraph on p. 968, as to the sale by a company of land subject to a floating security; pages 970—974, dealing with the capacity

(*a*) 1908, 1 K. B. 378.

of unincorporated societies established under statutory powers, and with mortgages to building, friendly and industrial and provident societies; the paragraph on pp. 1216—1218, as to rights appendant and appurtenant; p. 1235 to the end of the first paragraph; the discussion on pp. 1245—1249 of the question, whether a mortgagee of registered land, who desires to retain the legal estate therein, can safely take an unregistered mortgage by demise for a long term without procuring any restriction on the mortgagor's statutory powers of disposition to be registered; the discussion on pp. 1272—1281 of the law relating to succession duty on remainders in realty transmitted or transferred before falling into possession; and pp. 1323—1328, dealing with Increment Value Duty payable on death, and with the power to charge Increment Value Duty or Reversion Duty on land settled or vested in trustees.

The following passages are also new:—The last sentence in note (*l*) to p. 871; the statement in note (*q*) to p. 875; the sentences on pp. 894, 895, to which notes (*n*) to (*t*) are annexed (this passage has been re-stated); the statement in note (*m*) to p. 896; that in the first paragraph on p. 907, except as regards disclaimer; the last sentence in note (*g*) to p. 911; the sentence on p. 912, to which note (*n*) is annexed; the statement in note (*p*) to p. 913, and the sentence on that page to which note (*t*) is annexed; the statement on pp. 916, 917, of the Married Women's Property Act, 1907, s. 4; the last part (from "At

common law”) of note (*k*) to p. 919; the statement in note (*p*) to p. 920; the latter part of note (*z*) to p. 937; the statement in note (*p*) to p. 985; note (*f*) to p. 1017; the last sentence in note (*a*) to p. 1039; note (*l*) to p. 1051; the statements in note (*m*) on p. 1052, from “The right of the injured party” to “breach of the contract”; the first sentence in note (*q*) to p. 1053; the last in the first paragraph on p. 1057; the statement in note (*e*) to p. 1060; that in note (*e*) to p. 1069; the last sentence in note (*d*) to p. 1074; the last sentence and notes (*l*) (*m*) on p. 1164 as to estoppel; the parenthesis ending with note (*z*) on p. 1170; the sentence to which note (*y*) is annexed on p. 1174; the latter half of p. 1176, as to where the registered title is possessory; the parenthesis in the first sentence on p. 1177; the sentence on p. 1218, to which note (*h*) is annexed; that on p. 1221 to which note (*k*) is annexed; note (*z*) to p. 1228; note (*z*) to p. 1232; the first sentences in notes (*j*) to p. 1240 and (*n*) to p. 1242; the last two sentences in the text on p. 1252; nearly all of note (*q*) on pp. 1262, 1263; the sentences on p. 1264 to which notes (*z*) (*b*) (*c*) are annexed; the passages as to woodlands in note (*n*) to p. 1267 and in the text on p. 1285; the sentences on p. 1286 to which notes (*t*) (*x*) are annexed; that on p. 1283 to which note (*h*) is annexed; so much of notes (*q*) (*r*) to p. 1290 and (*k*) to p. 1294 as state provisions of the Finance (1909—10) Act, 1910; the sentence on p. 1300 to which note (*l*) is annexed; that on p. 1301 which includes note (*u*); the state-

ment as to the rate of settlement estate duty on p. 1303 and that in note (*f*) thereto; note (*m*) to p. 1305; the statement in note (*c*) to p. 1308; the sentence including note (*a*) on pp. 1311, 1312; that on p. 1314 to which note (*s*) is annexed; the statement in note (*b*) to p. 1315; and the sentence on p. 1317 which includes note (*q*).

In revising the proofs of the Chapter on the Sale of Registered Land the Author has been enabled to add several references (*b*) to the Second Report (1911) of the Royal Commission on the Land Transfer Acts. And owing to the doubts expressed in the evidence taken by the Commission, and in their Report, he has advised (*c*) that purchasers of registered land should make the same searches for writs and orders affecting land, for *lis pendens* and for land charges (where necessary) as are usually made on the sale of unregistered land.

The Appendix contains two new precedents—(1) a form of Conditions of Sale by Auction of Freehold and Leasehold Property in Lots (*d*), which includes several special, as well as general, conditions illustrative of various matters discussed in the text of the book; and (2) a form of inquiries supplemental to requisitions on title (*e*). Altogether, this Edition contains, in text and Appendix, 212 pages more than the first.

(*b*) See pp. 1168, n. (*p*), 1190, n. (*z*), 1195, n. (*d*), 1196, n. (*e*), 1207, n. (*q*).

(*c*) See pp. 1195, 1197, 1198, 1232, 1234, 1236.

(*d*) Below, p. 1329.

(*e*) Below, p. 1355.

The *Addenda* printed in this volume include all cases relating to the matters discussed in the first volume, and decided or reported since the publication thereof. They bring the whole work up to the date given below. The Author desires especially to call attention to the important case there noted of *Carlisle and Cumberland Banking Co. v. Bragg* (*f*), in which the theory adopted in this book with respect to mistake, as a ground of avoiding a contract (*g*), was fully confirmed by the decision and judgments of the Court of Appeal. Owing to this case also, he desires to restrict the statements made on pp. 753 (line 12) and 755 (line 16) in the manner indicated in the *Addenda*.

The Author's best thanks are due to his former pupil, Mr. H. ERNEST GLAISYER, of Lincoln's Inn, for the care and trouble he has taken in seeing the whole of the book through the press. Mr. GLAISYER is also responsible for the revision of the Table of Contents, and for the entire work of preparing the new Table of Cases, with references to all the reports, the new Index of the Defendants' Names in the Cases, and the General Index to this Edition.

7, STONE BUILDINGS, LINCOLN'S INN,

7th April, 1911.

P.S.—The *Addenda* now comprise all relevant cases reported in the Law Reports and Weekly Notes down to the 3rd of June (the end of the Easter Sittings), 1911.

(*f*) 1911, 1 K. B. 489.

vol. 2, 1st ed. : xi, xviii, xix, 748—

(*g*) See pp. iv, v, 666—674 of

757 of vol. 1, 2nd ed.

The following paragraphs comprise so much of the Preface to the Second Volume of the First Edition as relates to the Chapters now contained in the Second Volume (h).

The writer has entered a strong protest (*i*) against the acceptance as law of the decision of Bacon, V.-C., in *Taylor v. Johnston* (*k*) that an infant is capable of making a perfectly valid gift of money or other choses in possession; he has remarked upon the oft-cited but probably misreported *dictum* of Lord Mansfield in *Buckinghamshire v. Drury* (*l*); and he has discussed the question, whether an infant, who has purchased land assured to him in fee simple, can recover the purchase-money if he elect to avoid the conveyance (*m*). Under the head of the incapacity of married women (a subject of the most appalling intricacy), it is submitted that the inconvenient consequences of the decision in *Re Harkness and Allsopp's Contract* (*n*) are not so easily obviated as might be supposed from the decision of Farwell, J., in *Re West and Hardy's Contract* (*o*); that a subsequent purchaser's objection to a conveyance by a married woman alone is not removed by the fact that he has no notice that she was a trustee; and that, as the Married Women's Property Act, 1882, only confers on wives a special and not a general capacity to alienate their lands, it is incumbent on any person making title through a conveyance by a married woman alone to prove either that she was entitled to the estate assured as her separate property, or that, if she were a trustee thereof, she had power to convey the same as a bare trustee (*p*). It is contended that the decision of Chitty, J., in *Re Hodson* (*q*), as to the capacity of a married woman to confirm or avoid her voidable conveyance or contract made whilst she was an infant and single, is at variance with the earlier authorities on this point in equity as well as at

(*h*) See the Preface to vol. 1 of this edition, pp. xi, xviii.

(*i*) P. 871, n. (*m*).

(*k*) 19 Ch. D. 603.

(*l*) 2 Eden, 60, 72.

(*m*) Pp. 872, n. (*m*), 873, 884, 885.

(*n*) 1896, 2 Ch. 358.

(*o*) 1904, 1 Ch. 145.

(*p*) Pp. 919—921. (See now the amending Act stated and discussed on pp. 922—924.)

(*q*) 1894, 2 Ch. 421.

law (*r*); and further, that the *principle* followed by the Court of Appeal in *Viditz v. O'Hagan* (*s*), with regard to the incapacity to consent imposed on a wife by Austrian law, is exactly the same as that which determined the rule of the English common law (*t*). And attention has been called to the unsatisfactory state of the authorities with respect to the devolution, when a corporation is dissolved, of lands of which it was seised in fee; a point of practical importance owing to the frequent dissolution of companies after being wound up (*u*).

In dealing with the subject of relative disability in equity (*x*), the writer has put forward a threefold classification in preference to that adopted by Mr. Dart. In connection with the discharge of the contract, he has discussed the question, whether the parties are entitled to *restitutio in integrum* where a contract partly performed is discharged by mutual assent (*y*); he has also examined the subject of discharge for impossibility of performance (*z*). Under the head of the remedies for breach of the contract (*a*), he has placed first, as a substantive remedy in itself, rescission grounded on the opposite party's breach of an essential stipulation in the agreement; and he has maintained (*b*) that in this case, as in all other cases of rescission, the rule is that it must be accompanied by *restitutio in integrum*. An exception however occurs with regard to a deposit paid as a guarantee for due performance of the contract; and it is contended (*c*), in opposition to the ruling of Farwell, J., in *Jackson v. De Kadich* (*d*), that this exception equally exists, where the deposit has been paid to a stakeholder. The writer has particularly dealt with the cases of re-sale after a rescission of the contract, under an express power of re-sale (*e*), and after an action for damages for breach of the agreement (*f*). He has contended (*g*) that, where a purchaser can recover substantial damages for loss of his bargain, he cannot *also* claim to be recouped his expenses incurred under the contract; although such a claim was by inad-

(*r*) P. 941, and n. (*z*).

(*s*) 1900, 2 Ch. 87.

(*t*) P. 942, n. (*a*).

(*u*) P. 962.

(*x*) Pp. 975 *sq.*

(*y*) P. 1016.

(*z*) Pp. 1018 *sq.*

(*a*) Pp. 1050 *sq.*

(*b*) P. 1054.

(*c*) P. 1055, n. (*f*).

(*d*) 1904, W. N. 168.

(*e*) Pp. 1059—1061.

(*f*) P. 1080.

(*g*) P. 1071.

vertence actually allowed in *Engel v. Fitch* (*h*), and was admitted in *Godwin v. Francis* (*i*). The true principle appears to have been applied by the Court of Appeal in *Day v. Singleton* (*k*), but the head-note to that case does not correctly represent the effect of their judgment. The writer has considered (*l*) the effect of a judgment for damages or specific performance in barring the alternative remedy, and the effect of the dismissal of a claim for specific performance on the remedy in damages. And in examining the latter remedy he has given (*m*) an analysis of the defences which are available to an action for damages for breach of the contract; and has added (*n*) a summary of the law determining the parties' position, where one of the signatories to the memorandum professes or is alleged to have signed as agent for another person.

In discussing the remedy by suing for specific performance of the contract (*o*), the writer has made no attempt to compile a manual of practice, but has confined himself to endeavouring to ascertain what are the essential points of difference between this remedy and that by action for damages at law. On the other hand, in describing the proceedings by vendor and purchaser summons (*p*), he has gone into points of practice; this being now the normal remedy for settling disputes on any conveyancing points arising out of the contract. The chapter on the parties' Remedies concludes with an account of the purchaser's remedies for disturbance after completion (*q*), especially under covenants for title (*r*); and the writer has especially discussed the questions, whether acts not affecting the title or possession can be a breach of a covenant for quiet enjoyment (*s*), criticising particularly (*t*) the case of *Sanderson v. Mayor of Berwick-on-Tweed* (*u*), and what is the true measure of damages for breach of the various covenants for title (*x*). On one important point connected with this last subject he regrets to find his opinion in conflict with that of the learned author and editor of *Mayne on Damages* (*y*).

(*h*) L. R. 4 Q. B. 659.

(*i*) L. R. 5 C. P. 295.

(*k*) 1899, 2 Ch. 230.

(*l*) Pp. 1073—1078.

(*m*) P. 1078.

(*n*) Pp. 1081 *sq.*

(*o*) Pp. 1091 *sq.*

(*p*) Pp. 1121 *sq.*

(*q*) Pp. 1132 *sq.*

(*r*) Pp. 1134 *sq.*

(*s*) Pp. 1146—1148.

(*t*) P. 1147, n. (*m*).

(*u*) 13 Q. B. D. 547.

(*x*) Pp. 1152—1157.

(*y*) P. 1157, n. (*s*).

One of the main causes of the writer's delay in completing this volume has been the last chapter on the Sale of Registered Land, which has far exceeded its estimated limits. He has nevertheless tried to be as brief as is compatible with any real discussion of this very complicated and difficult branch of the law. And, although the subject of the mortgage of registered land hardly comes within the scope of this treatise, he has been obliged to devote some pages (*z*) to its discussion in order to explain the particular difficulties now attendant on the sale, followed by an immediate mortgage, of registered land (*a*) and unregistered land situate in a compulsory registration district (*b*). Here again he regrets to find his opinion conflicting with that of eminent lawyers on important points (*c*), and to be obliged to advise against the safety of a very convenient course, which other practitioners have recommended (*d*).

(*z*) Pp. 1237—1245.

(*a*) Pp. 1250—1252.

(*b*) Pp. 1253 *seq.*

(*c*) See pp. 1238, n. (*b*), 1240, n. (*j*).

(*d*) See p. 1251, n. (*d*).

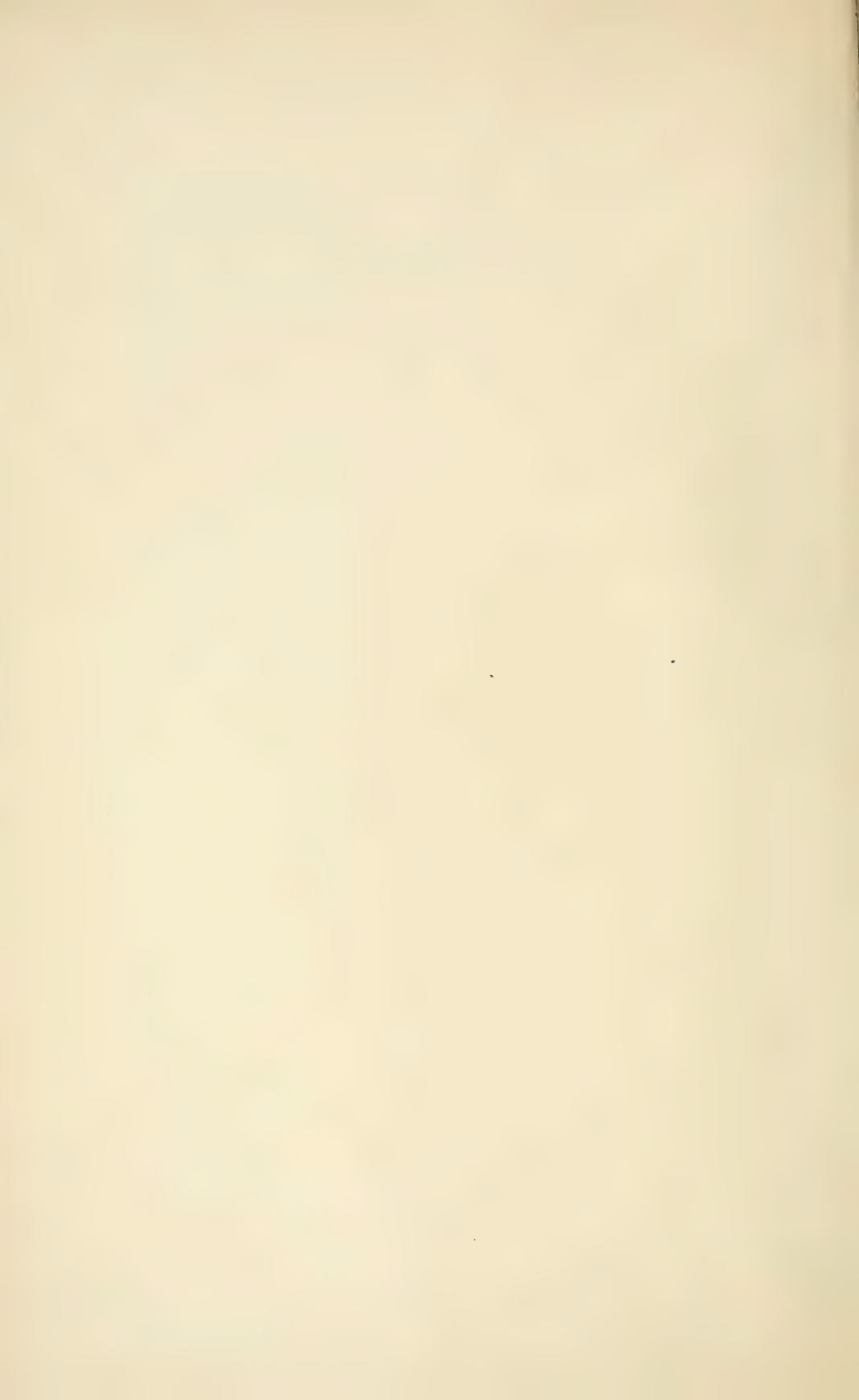


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 ERRATA. ✓

Page 80, n. (f), for "Chap. XII." read "Chap. X."

82, n. (s), }
 269, n. (m), } *delr* "at end."

288, n. (u), line 7, for "c. 23" read "c. 35, s. 23."

410, n. (r), last line, for "c. 104" read "c. 106."

416, n. (e), at end, for "n. (x)" read "n. (u)."

ADDENDA. ✓

Page 44, n. (b), add "*Shepherd v. Croft*, 1911, 1 Ch. 521."

66, n. (b), add "*Parker, J., Shepherd v. Croft*, 1911, 1 Ch. 521, 528, 529."

126, n. (x), add in line 23, after "purchaser," "*Rourke v. Robinson*, 1911, 1 Ch. 480."

159, n. (c), add "*Re Hoyles* has been affirmed, 1911, 1 Ch. 179."

164, n. (f), } add "*Esdaile v. Stephenson*, 6 Madd. 366."
165, n. (i), }

224, n. (x), add to *Addenda* to vol. 1, "*Re Evans & Bettel's Contract*, 1910, 2 Ch. 438."

294, n. (d), add "*Re Hoyles* has been affirmed, 1911, 1 Ch. 179."

297, n. (t), add "*Cloutte v. Storey*, 1911, 1 Ch. 18, 30 sq."

301, n. (I), add "As to where the Public Trustee is trustee for these purposes, see *Re Leslie's Hassop Estates*, 1911, 1 Ch. 611."

359, n. (f), add to *Addenda* to Vol. 1, "*Willmott v. London Road Car Co., Ltd.*, in C. A. is now reported, 1910, 2 Ch. 525;" and add at end, "The decisions in *Jenkins v. Price* and *Evans v. Levy* as to the lessee's costs have now been overruled; *West v. Gwynne*, 1911, W. N. 127."

361, n. (t), add to *Addenda* to Vol. 1, "*Willmott v. London Road Car Co., Ltd.*, in C. A. is now reported, 1910, 2 Ch. 525."

370, n. (t), add a reference to an article by the writer in 49 Sol. J. 547.

412, n. (d), add "*Caledonian Ry. Co. v. Glenboig, &c. Co.*, 1911, A. C. 290."

417, n. (k), add at end, "*Cf. Central London Ry. Co. v. City of London Land Tax Commrs.*, 1911, 1 Ch. 467."

419, n. (f), add after "*Tilbury v. Silva*," "*Jones v. Llanrwst, &c. Council*, 1911, 1 Ch. 393, 401."

420, n. (m), add at end of first sentence, "and as to the limits of the public right of navigation, *Denaby, &c. Collieries, Ltd. v. Anson*, 1911, 1 K. B. 171."

Page 422, n. (c), add "Jones v. Llanvriest, &c. Council, 1911, 1 Ch. 393."

435, n. (m), add "Cundiff v. Fitzsimmons, 1911, 1 K. B. 513."

450, n. (s), add "Re Hoyles has been affirmed, 1911, 1 Ch. 179."

476, n. (q), add "Cloutte v. Storey, 1911, 1 Ch. 18, 24, 30—32."

487, n. (s), *British South Africa Co. v. De Beers, &c., Ltd.*, has been affirmed on appeal, 1910, 2 Ch. 502.

487, n. (u), add "Whiteman v. Sadler is now reported, 1910, A. C. 514."

487, nn. (x, y), add "Re Robinson, 1910, 2 Ch. 571; affd. 1911, 1 Ch. 230."

634, n. (m), add "As to the sale of an estate by plan in Scotland, see *Gordon Cumming v. Houldsworth*, 1910, A. C. 537."

640, line 19, after "right" add a note referring to Parker, J., *Browne v. Flower*, 1911, 1 Ch. 219, 224—227.

672, n. (h), add at end "See *Mills v. United Counties Bank, Ltd.*, 1911, 1 Ch. 669."

712, n. (g), add a reference to Appendix (B).

723, n. (u), add "Shepherd v. Croft, 1911, 1 Ch. 521."

723, n. (o), add "and see *Shepherd v. Croft*, 1911, 1 Ch. 521, 531."

727, n. (m), add "and see Parker, J., *Shepherd v. Croft*, 1911, 1 Ch. 521, 528, 529."

742, n. (d), add "See *Re Sheppard*, 1911, 1 Ch. 50."

745, n. (c), add "Cundiff v. Fitzsimmons, 1911, 1 K. B. 513."

748, last line but four, after "influenced" add a note referring to *Whitehorn v. Davison*, 1911, 1 K. B. 463, 479, 486.

749, 1st line, after "parties" insert a note referring to *Carlisle and Cumberland Banking Co. v. Bragg*, 1911, 1 K. B. 489.

749, 2nd line, after "only," add a note referring to *Whitehorn v. Davison*, 1911, 1 K. B. 463.

749, n. (e), 3rd line, after "2nd ed." add "*Carlisle and Cumberland Banking Co. v. Bragg*, 1911, 1 K. B. 489, 497."

750, n. (f), add "*Carlisle and Cumberland Banking Co. v. Bragg*, 1911, 1 K. B. 489."

752, n. (i), at end, add "And see *Carlisle and Cumberland Banking Co. v. Bragg*, 1911, 1 K. B. 489, 497."

753, nn. (k, m), add "*Carlisle and Cumberland Banking Co. v. Bragg*, 1911, 1 K. B. 489."

753, last line but one, insert at beginning "what he knows to be," and after *document*, "capable of affecting his legal relation to some other person present to his mind as a proposed contractor or grantee."

Page 753, n. (n), add at end, "But cf. *Carlisle and Cumberland Banking Co. v. Bragg*, 1911, K. B. 489, where it was held that a man, who had been entrapped into signing, without reading, a guarantee of a friend's banking account by the friend's fraudulent representation that it was a paper relating to some insurance matter, was not estopped by his negligence from proving his mistake as against the banking company, to whom it was considered that he owed no duty of care."

754, n. (o), add "The passage in the text is fully confirmed by the case of *Carlisle and Cumberland Banking Co. v. Bragg*, 1911, 1 K. B. 489."

755, line 12, after "argument," add a note referring to *Carlisle and Cumberland Banking Co. v. Bragg*, 1911, 1 K. B. 489.

755, line 18, substitute "man executes a document which he knows to be a contract in favour of some particular person without reading."

757, nn. (b, d), add at end, "*Whitehorn v. Davison*, 1911, 1 K. B. 463."

759, n. (m), add at end, "*Whitchorn v. Davison*, 1911, 1 K. B. 463, 479, 486."

763, n. (e), line 3 (after add " *Angel v. Jay*, 1911, 1 K. B. 666,
"2nd ed."),
673, 674; *Shepherd v. Croft*, 1911, 1 Ch.
521."

763, n. (f),

765, n. (o), add at end, "It is submitted that the judgment of Parker, J., in *Shepherd v. Croft*, 1911, 1 Ch. 521, 525, 528, 530, 531, supports the view put forward in the text. It seems obvious that in that case no claim for compensation could have been admitted if the vendor had not sold the land as possessing building advantages."

766, line 5, after "fraudulent," add a note, "The decision of Parker, J., in *Shepherd v. Croft*, 1911, 1 Ch. 521, appears to support the qualification suggested in the text."

767, nn. (x, z), add "*Shepherd v. Croft*, 1911, 1 Ch. 521."

769, n. (m), add "cf. *Shepherd v. Croft*, 1911, 1 Ch. 521, 528."

815, n. (g), add "*Angel v. Jay*, 1911, 1 K. B. 666 (acceptance of a lease induced by innocent misrepresentation)."

843, n. (y), add "*Bank of Montreal v. Stuart*, 1911, A. C. 120."

843, n. (z), add "and consider *Re Coomber*, 1911, 1 Ch. 174, 723."

845, n. (m), add "It is respectfully submitted that the dictum of Stirling, L.J., in *Wright v. Carter*, 1903, 1 Ch. 27, 60, that independent advice is necessary to uphold the sale, was inadvertently uttered, and that the right rule is laid down by the same learned judge in *Re Haslam and Hier Evans*, 1902, 1 Ch. 765, 770."

854, n. (d), add "*Upfill v. Wright*, 1911, 1 K. B. 506."

855, line 5, after "account," add a note referring to *Whiteman v. Sadler*, 1910, A. C. 514, 525—527; above, p. 487.

Page 855, n. (m), } add “ *Upphill v. Wright*, 1911, 1 K. B. 506.”
856, n. (n), }

963, n. (r). On the subject here discussed the author may now refer to Mr. Charles Sweet's notes to his edition of Challis on Real Property, pp. 439, 467, 3rd ed. Mr. Sweet's conclusions are in accord with the views propounded in this book.

979, n. (n), *Re Coomber* has been affirmed, 1911, 1 Ch. 723.

986, n. (z), add “ *Napier v. Williams*, 1911, 1 Ch. 361.”

1294, n. (k), add, in line 11, after “ *A.-G. v. Richmond*,” “ *Re Hartland*, 1911, 1 Ch. 459.”

1321, n. (q), add, after “ *Re Stamford and Warrington*,” “ *Re Hartland*, 1911, 1 Ch. 459.”

1321, n. (t), add “ *Re Hartland*, 1911, 1 Ch. 459.”

THE LAW
RELATING TO
VENDOR AND PURCHASER OF LANDS.

CHAPTER XVI.

OF PERSONAL INCAPACITY.

To constitute a valid contract, all parties to the agreement must enjoy full contractual capacity (*a*) ; and when the object of the contract is the sale of land, it is also necessary, in order to carry out the parties' intention, that the vendor shall have full capacity to dispose of his land and the purchaser to accept a conveyance thereof. In the present chapter therefore we will treat of personal incapacity, not only to contract with regard to land, but also to purchase it in the legal sense of the word *purchase* (that is, to take it by any title other than descent (*b*)), to hold it and to dispose of it. A further reason for so extending our examination of personal incapacity is that, upon the investigation of the title to any land sold, it is the duty of the purchaser's advisers to consider the capacity of all persons who

Full personal capacity a requisite of the contract.

a) Above, pp. 1, 2.

b) Litt. s. 12, Co. Litt. 18b.

have made any assurance forming part of the title, to dispose of the land in the manner expressed therein (*e*).

Persons of
full capacity.

As a rule, all natural persons (*d*) being of the age of twenty-one or upwards, of sound mind and in their sober senses, enjoy full capacity to purchase land, to hold it, to dispose of it and to contract with regard to it (*e*). Those who labour under some disability are infants, persons of unsound mind, drunken persons, married women, convicts, outlaws, alien enemies and corporations. We will examine the peculiar disabilities of each of these classes in turn; and in this examination we will use the word *purchase*, when printed in italics, as meaning purchase in the legal sense of the term.

Infants.

Infants are all persons under the age of twenty-one years (*f*). The *purchase* of land by an infant is voidable at his option; that is, he may disagree thereto within a reasonable time after coming of age; and so may his heir or personal representative (according to the nature of the land) within a reasonable time after his death, if he die while the purchase is voidable. But the *purchase* remains good until set aside (*g*). Disagreement to the *purchase* is the same thing as disclaimer of the estate (*h*); so that until this take place the estate conveyed is *in* the infant or his representatives; though on the avoidance of the *purchase* it will revert (without any express assurance) to the conveying party or his

(*c*) Above, p. 170.

(*d*) Including since the Naturalization Act, 1870, aliens; stat. 33 Vict. c. 14, s. 2.

(*e*) Co. Litt. 2, 42b; Wms. Real Prop. 295, 21st ed.

(*f*) Litt. s. 259; Co. Litt. 2b, 78b, 171b.

(*g*) Co. Litt. 2b, 380b; *Ketsey's*

Case, Cro. Jac. 320; 1 Prest. Abst. 327; *Birkenhead, &c. Ry. Co. v. Pilcher*, 5 Ex. 121, 123—128; *Thurstan v. Nottingham, &c. Bldg. Socy.*, 1902, 1 Ch. 1, 9, 13; affd. 1903, A. C. 6.

(*h*) See Shep. Touch. 284, 285; 2 Prest. Abst. 226, 228; *Townsend v. Tickell*, 3 B. & A. 31.

successors in interest (*i*). It is now settled, as we have seen (*k*), that disclaimer of any estate in land may be made by conduct, and need not, even in the case of freeholds, be evidenced by matter of record or by deed. It follows from what has been said that an infant is under no incapacity to hold land. As regards his power to dispose of his land, the general rule is that an infant's conveyance, whether of lands or goods and whether gratuitous or for value, is voidable by himself within a reasonable time after he has attained full age (*l*), or by his representatives after his death, if he die while the conveyance is still voidable, in the same manner as his *purchase* of land (*m*). But by the effect

Disclaimer.

Infants' conveyances.

(*i*) Above, p. 749, n. (*e*).

(*k*) Above, p. 272, n. (*d*).

(*l*) An infant's conveyance by act *in pais* is voidable during his minority: but an infant cannot of himself alone *conclusively* avoid during his infancy a voidable conveyance made by him; as before he attains full age his avoidance of his act *in pais* is as voidable as the act itself; see Litt. s. 258; Co. Litt. 171b, 380b; 2 Inst. 673; Bac. Abr. Infancy and Age (i. 7,

iv. 374); *Stator v. Trimble*, 14 Ir. Com. Law. 312. But it appears that an infant may, with the sanction of the Court, effectually elect to avoid his voidable act *in pais*; *Stephens v. Dndbridge, &c. Co.*, 1904, 2 K. B. 225. Acts *in pais* include all acts affecting a person's property or legal relations other than those done in a court of record; *Beverley's Case*, 4 Rep. 123b, 124a.

(*m*) Litt. s. 259; Co. Litt. 45b, 171b, 308a, 380b; Shep. Touch. 232, 233; Bac. Abr. Infancy and Age (I. 3); 2 Black. Comm. 291, 292; *Zouch v. Parsons*, 3 Burr. 1794; *Allen v. Allen*, 2 Dru. & War. 307, 338, 346; Jessel, M. R., *Re D'Angibau*, 15 Ch. D. 228, 233, 234; Wms. Real Prop. 67, 13th ed.; Wms. Pers. Prop. 54, 11th ed. It is submitted that the true principle of this rule is that a man's complete consent is necessary to the validity of any conveyance or contract made by him; see above, p. 749, and n. (*e*); and that an infant cannot give such consent until he come of age; *Williams v. Moor*, 11 M. & W. 256, 264, 265; Benjamin on Sale, 18, 2nd ed. On this principle, a marriage settlement made by an infant, whether of real or personal estate, and whether by way of conveyance or contract, is, as a rule, voidable at his or her option; and the marriage settlement by a female infant of her property, which would at common law vest in her husband upon her marriage, is *only* supported on the ground that the settlement is in effect a settlement made by him of his own property; see *Trollope v. Linton*, 1 S. & S. 477, 485; *Simson v. Jones*, 2 Russ. & My. 365, 374; *Ellison v. Elwin*, 13 Sim. 309; *Le Vasseur v. Scrutton*, 14 Sim. 116; *Field v. Moore*, 7 De G. M. & G. 691, 711—714; *Honywood v. Honywood*, 20 Beav. 451; *Duncan v. Dixon*, 44 Ch. D. 211; *Stevens v. Trehear-Garrick*, 1893, 2 Ch. 307; *Re Jones*, 1893, 2 Ch. 461; *Edwards v. Carter*, 1893, A. C. 360; *Re Hodson*, 1894, 2 Ch. 421;

Infants' marriage settlements.

Mortgages
by infants.

of the Infants Relief Act, 1874 (*n*), which makes void all contracts entered into by infants for the repayment of money lent, the mortgage by an infant, either of his lands or goods, to secure the repayment of money lent to him is absolutely void; and this applies, not only to the contract of repayment, but also to the conveyance of the estate or interest mortgaged. An infant's voidable conveyance of his land, being good until set aside, passes the legal estate therein to the alienee in the first instance: but if the infant or his representatives afterwards duly elect to avoid it, the conveyance becomes

Effect of an
infant's
conveyance
and its
avoidance.

Infants' gifts
of money.

Buckland v. Buckland, 1900, 2 Ch. 534; Davidson, *Prec. Conv.* iii. 647 sq., 3rd ed.; Wms. *Pers. Prop.* 507, 508, 514, 16th ed. And consider *Viditz v. O'Hagan*, 1900, 2 Ch. 87, where it was held that a marriage settlement made by a female infant was not binding on her, though not repudiated by her within a reasonable time after she came of age, because she had all the time been subject to Austrian law, which did not allow her capacity to assent to the settlement. In *Taylor v. Johnston*, 19 Ch. D. 603, 608, Bacon, V.-C., held that a voluntary gift of money by an infant was valid and not voidable, saying, "I am not aware of any law which prevents an infant from making a donation of any chattels or personal property in his actual possession"! It is submitted that this decision cannot possibly be supported, and that the suggestion made in the V.-C.'s *dictum* is entirely opposed to all the authorities above cited and cannot be accepted. The origin of the V.-C.'s mistaken decision appears to be a *dictum* of Lord Mansfield in *Buckinghamshire v. Drury*, 2 Eden, 60, 72, that "if an infant pays money with his own hand *without* a valuable consideration for it, he cannot get it back again." It has been conjectured that this passage is misprinted and that *with* should be read instead of *without*; Simpson on Infants, 75, n. (o), 2nd ed. And this seems highly probable, as it is certainly laid down by elder authorities that an infant's gift made by delivery of a chattel or money is voidable, and he may recover it, if he elect to avoid the gift; and may get back the money in an action of account; Perk. s. 12; *Austen v. Gervas*, Hob. 77; *Manby v. Scott*, 1 Mod. 124, 137; Bac. Abr. Infancy (I. 3), p. 367, 7th ed. Lord Mansfield's *dictum* as printed has, however, been religiously repeated; see *Holmes v. Blogg*, 8 Taunt. 508, 511; but it has not been followed, and it is now established that an infant may recover money paid with his own hand under a contract, from which he has derived no benefit, and which he has elected to avoid; *Corpe v. Overton*, 10 Bing. 252; *Hamilton v. Vaughan-Sheerin, &c. Co.*, 1894, 3 Ch. 589. These cases appear to dispose alike of Lord Mansfield's *dictum* and V.-C. Bacon's decision; for if an infant can recover money actually paid by him under a contract, where there was a consideration for the payment, *a fortiori* he must be able to get back money paid as a free gift.

(*n*) Stat. 37 & 38 Vict. c. 62, Bdg. Socy., 1902, 1 Ch. 1, 1903, s. 1; *Thurston v. Nottingham, &c.* A. C. 6.

absolutely void, and he or they become immediately entitled to the land, without any reconveyance, and have the right to re-enter upon and hold the same as of the infant's old estate therein. For this reason (*o*), an infant's conveyance, either of his lands or goods, is not rendered valid, like a conveyance induced by fraud (*p*), by the fact that it is made to a purchaser for value, taking in good faith and without notice of the infancy; but remains equally voidable in these circumstances at the infant's option as if it had been made gratuitously (*q*). It follows that, if one purchase land of an infant, believing him to be of full age, and sell or mortgage it to another, the infant may avoid his conveyance, and recover the land from the second purchaser or the mortgagee as well as from the original buyer. If, however, an infant fraudulently represent himself to be of full age, and so procure another to complete with him a transaction of sale or purchase, the transaction is in equity (though not at law (*r*)) avoidable by the party misled (*s*) in the same manner and to the same extent as if the transaction had been induced by the fraud of a person of full age (*t*). But the equitable jurisdiction, which thus prevents an infant from taking advantage

Infant's voidable conveyance is not made valid through purchase for value without notice of infancy.

Infant's sale or purchase procured by his fraudulent representation that he is of age.

(*o*) A conveyance of land induced by fraud, misrepresentation, duress or undue influence is not voidable in the same manner; the conveying party is left with a mere right of action to set the transaction aside; and if he assert this, a re-conveyance will be necessary to give him the legal estate therein; see above, pp. 757, 830.

(*p*) Above, pp. 757, 830.

(*q*) See *Johnson v. Pie*, 1 Keb. 905, 913, as to the mortgage there mentioned; *Stikeman v. Dawson*, 1 De G. & S. 90, 113; *Inman v. Inman*, L. R. 15 Eq. 260. Of course, where the infant's conveyance is void, as in the case of

a mortgage, it cannot be so validated; *Thurstan v. Nottingham, &c. Bd. Socy.*, 1902, 1 Ch. 1, 1903, A. C. 6.

(*r*) The rule of law is that an infant's conveyance or contract cannot be made valid by his own fraud; see *Pigot v. Russel*, Cro. Eliz. 124; *Johnson v. Pie*, 1 Keb. 905, 913; *Jennings v. Rundall*, 8 T. R. 335; *Nelson v. Stocker*, 1 De G. & J. 458, 465; *Bartlett v. Wells*, 1 B. & S. 836, 841.

(*s*) *Watts v. Creswell*, 2 Eq. Ca. Abr. 515, pl. 3; *Clarke v. Cahley*, 2 Cox, 175; *Lemprière v. Lange*, 12 Ch. D. 675.

(*t*) Above, pp. 828 sq.

of his own fraud, extends only to decreeing the rescission of the transaction and the restitution of the thing fraudulently obtained, and does not enable the party misled to obtain compensation, if he choose to affirm the transaction (*u*). On the same principle it seems that if an infant, by a fraudulent representation of this kind, procure a loan on mortgage of his lands or goods, he may be obliged under the equitable jurisdiction of the Court to repay what is owing as a condition of his invoking the assistance of the Court to declare the invalidity of the mortgage or to recover possession of the property mortgaged or the title deeds thereof (*x*). But to bring this principle into operation, there must be an actual representation made either by the infant's positive assurance that he is of age or by his active concealment of the facts (*y*); mere silence as to his age is insufficient (*z*). A power of attorney given by an infant to do on his behalf any act which might bind him is absolutely void as against him (*a*).

Infant's
power of
attorney.

Where an
infant can
make a valid
conveyance.

An infant is enabled to make a valid conveyance in the following cases:—First, he may convey real estate under a power simply collateral (*b*) and exercisable by

(*u*) See last note but one; and cf. above, pp. 806, 811, 828 *sq.* If an infant, by fraudulently representing himself to be of full age, obtain a loan of money, the lender has an equitable claim to recover the money. The infant does not in this case contract a debt; but he incurs an equitable liability which is provable, if he be made bankrupt after attaining full age: *Expte. Unity, &c. v. Ascension*, 3 De G. & J. 63; *Expte. Jones*, 18 Ch. D. 109, 120—125.

Power simply
collateral.

(*v*) See Romer, L. J., *Thurstan v. Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 12; *Lodge v. National Union Investment Co.*,

Id., 1907, 1 Ch. 300; above, p. 862, n. *p*).

(*y*) Above, pp. 769, 817.

(*z*) *Stikeman v. Dawson*, 1 De G. & S. 90; *Expte. Jones*, 18 Ch. D. 109, 120—125; *Thurstan v. Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 12, 1903, A. C. 6; and cf. above, p. 767.

(*a*) Bac. Abr. Infancy (I. 3); *Zouch v. Parsons*, 3 Burr. 1791, 1804, 1808.

(*b*) A power simply collateral is a power, by the exercise of which the donee can acquire no interest in the subject-matter of the power, given to a person, who has not any interest therein at the time of the creation of the power and

deed (*c*): but he cannot convey real estate under any other power (*d*). As to personalty, an infant may also exercise by deed a power simply collateral, and may further exercise by deed any other power, as to which it appears to have been the donor's intention that it should be exercisable during infancy, and of which the exercise will not operate to diminish his interest in the property appointed (*e*). But it is submitted that an infant cannot exercise any power over personalty so as to deprive himself of any interest which he has in the subject of the power (*f*). An infant cannot now exercise any power by will; as under the Wills Act the rule is that no will made by an infant is valid (*g*). Secondly, under the custom of gavelkind an infant of the age of fifteen years or upwards may make a valid conveyance of his land, whereof he is seised subject to this custom, by feoffment executed on sale for valuable consideration (*h*). In this case the feoffment need not be evidenced by deed (*i*): but it must be put into writing and signed by the infant in order to satisfy the Statute of Frauds (*k*); and livery of seisin must be made by the infant in person (*l*). The custom, however, does not extend to enable the infant to give a valid receipt for the consideration money; the practice is therefore to endorse on the conveyance a written attestation of the fact of payment,

1. Exercise of powers by an infant.

Power exercisable by will.

2. Feoffment by an infant under the custom of gavelkind.

takes no interest therein under the instrument conferring the power; see Sug. Pow. 47, 48, 8th ed.

(*e*) Sug. Pow. 177, 910, 8th ed.; *King v. Bellord*, 1 H. & M. 343, 347; *Re D'Angibau*, 15 Ch. D. 228, 232, 233.

(*d*) *Hearle v. Greenbank*, 3 Atk. 695; *Re D'Angibau*, 15 Ch. D. 228, 233, 241, 244, 246.

(*c*) *Re Cardross's Settlement*, 7 Ch. D. 728; *Re D'Angibau*, 15 Ch. D. 228; *Poney v. Horrocks*, 1900, 1 Ch. 492, 495.

(*f*) *Re Armit*, 5 I. R. Eq. 352, 365; Farwell on Powers, 125,

2nd ed.

(*g*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 7; Sug. Pow. 178, 8th ed. The only exceptions are of wills made by infant soldiers on active service or infant sailors at sea of their own personal estate: sect. 11; *Re Farquhar*, 4 Notes of Cases, 651, 652; *Re McMurdo*, L. R. 1 P. & D. 549.

(*h*) Davidson, Prec. Conv. vol. ii, pt. i. 241, n., 4th ed.; *Re Maskell and Goldfinch's Contract*, 1895, 2 Ch. 525, 528, 529.

(*i*) Stat. 8 & 9 Vict. c. 106, s. 3.

(*k*) Stat. 29 Car. II. c. 3, s. 1.

3. Under the
Infant Settlements Act.

instead of inserting the usual receipt (*l*). But it is thought that the money may be safely paid to the infant (*l*). Where it appeared on the face of a feoffment on sale by a dowress and co-heirs in gavelkind, of whom one was an infant, that the infant had not received full value for his share, it was held that the title was too doubtful to be forced by the purchaser on a subsequent purchaser from him (*m*). It is conceived, however, that where it is not apparent that the sale was at an undervalue, it will be presumed that the infant received full value for his land (*n*). Thirdly, by the Infant Settlements Act, 1855 (*o*), every infant not under twenty if a male, and not under seventeen if a female, is empowered to make upon or in contemplation of his or her marriage (*p*), and with the sanction, formerly of the Court of Chancery and now of the Chancery Division of the High Court (*q*), a valid and binding

(*l*) See authorities cited in note (*h*), p. 875, above; where it is also stated that it is often advisable for the infant's sake that the purchaser should require the money to be invested in the names of trustees or in the infant's name until the infant attains twenty-one. It is conceived that if this course be adopted, it must be purely accessory to the payment of the money to the infant himself; for he cannot make a valid appointment of trustees for himself, so as to enable them to give a good discharge for the purchase money.

m, *Re Maskell and Goldfinch's Contract*, 1895, 2 Ch. 525. It appeared that the mother had received more than the just value of her interest as dowress, hence the infant's conveyance was voidable on the ground of undue influence; above, p. 842.

n, See above, pp. 118, 292.

o Stat. 18 & 19 Vict. c. 43, extended to the Court of Chancery in Ireland by stat. 23 & 24 Vict. c. 83.

(*p*) It has been held that, in the case of an infant ward of Court who has married without the Court's consent, a post-nuptial settlement of her property may be made under this Act; *Powell v. Oakley*, 34 Beav. 575; *Re Sampson and Wall*, 25 Ch. D. 482. There are conflicting judicial decisions and opinions as to whether the Act authorises a post-nuptial settlement in other cases; see *Re Potter*, L. R. 7 Eq. 484; *Re Sampson and Wall*, ubi sup.; *Re Phillips*, 34 Ch. D. 467; *Buckmaster v. Buckmaster*, 34 Ch. D. 21, 26, 36, 40, affirmed, nom. *Seaton v. Seaton*, 13 App. Cas. 61, 68, 75, 76. In this last case it was decided that the Act removed the disability of infancy only, and did not enable a female ward of Court by a post-nuptial settlement made thereunder to dispose of her reversionary chose in action, which she could not otherwise alien.

(*q*) As to infants' marriage settlements made without such sanction, see above, p. 871, n. (*m*).

settlement of all or any part of any property, whether real or personal, and whether in possession, reversion, remainder or expectancy (*v*), to which he or she is entitled, or over which he or she has any power of appointment, except a power expressly declared not to be exercisable by an infant. The Act makes every conveyance or contract to convey (*v*) executed by an infant with the approbation of the Court for giving effect to such settlement as valid and effectual as if the infant were of full age (*s*): but provides (*t*) that any appointment under a power or disentailing assurance executed by any infant *tenant in tail* under the Act shall become absolutely void if the infant die under age. It has been held that this provision invalidates appointments made by tenants in tail only, and not those made by other persons (*u*). Fourthly, infants are in certain special cases enabled by statute to make valid conveyances of land; as with the sanction of the Court for the purpose of giving effect to the sale or mortgage of a deceased testator's or intestate's lands in order to satisfy his debts (*x*), or to the surrender or grant of renewable leases (*y*). And infants' lands may by statute be assured by or with the consent of their guardians for certain charitable or meritorious uses (*z*) or public purposes (*a*).

(*v*) The Act thus enables an infant to make a perfectly valid covenant in the settlement to settle his or her after-acquired property; *Re Johnson*, 1891, 3 Ch. 48.

(*s*) Stat. 18 & 19 Vict. c. 43, s. 1.

(*t*) Sect. 2.

(*u*) *Re Scott*, 1891, 1 Ch. 298.

(*x*) Stats. 11 Geo. IV. & 1 Will. IV. c. 47, s. 11; 2 & 3 Vict. c. 60; 11 & 12 Vict. c. 87. These provisions are now superseded in practice by those of the Trustee Act, 1893, ss. 26, 27, 30, amended by s. 1 of the Trustee Act, 1894; see Seton on Judgments, 982,

983, 6th ed.

(*y*) Stat. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 12, 16, 31.

(*z*) As for sites for schools, stat. 4 & 5 Vict. c. 58, s. 5; for literary, scientific, and like institutions, stat. 17 & 18 Vict. c. 112, s. 5; for places of worship or burial, stat. 36 & 37 Vict. c. 50, s. 3; see above, p. 452, n. (*f*). As to infants' land required for the erection or construction of any house or building for the purposes of any charity, see stats. 16 & 17 Vict. c. 137, s. 7, amended by 18 & 19 Vict. c. 124, s. 41.

(*a*) As under the Lands Clauses Act, 1845, stat. 8 & 9 Vict. c. 18,

4. By statute in certain special cases.

Leases, sales
and improve-
ments of
infants' land.

By the effect of the Conveyancing Act, 1881 (*b*), the Court is enabled to authorise the same leases, sales, and improvements of any land, of or to which an infant is in his own right seised or entitled for an estate in fee simple or for any leasehold interest at a rent, as the Court has power to authorise in the case of a settled estate by virtue of the Settled Estates Act, 1877 (*c*). And by the effect of the Settled Land Act, 1882 (*d*), all the powers of a tenant for life under that Act may be exercised on behalf of an infant, not only where he is or has the powers of a tenant for life under the Act, but also with regard to any land, of or to which he is in his own right seised or entitled in possession for any estate or interest (*e*); and in such case these powers are exercisable by the trustees of the settlement (*f*), if any, or if there be none, then by such person and in such manner as the Court, on the application of the infant's testamentary or other guardian or next friend, may order. Under these enactments, any land, of which an infant is tenant for life at law or in equity, or in which he has any other estate or interest giving him the powers of a tenant for life under the Settled Land Act, 1882 (*g*), or of which he is seised in fee, or to which he is otherwise entitled in possession, may be effectively sold and conveyed to a purchaser, notwithstanding his infancy; and any leases authorised by the Settled Land Act may be made thereof in like manner. Where persons are specially appointed by the Court to

Sale or lease
of infant's
under the
Settled Land
Acts.

ss. 7, 69, 75, 81; or for the defence of the realm, stat. 23 & 24 Vict. c. 112, s. 11.

b. Stat. 44 & 45 Vict. c. 41, s. 41. As to the powers of dealing with infants' land before this enactment, see *Wms. Conv. Stat.* 200—203.

c. Stat. 40 & 41 Vict. c. 48.

d. Stat. 45 & 46 Vict. c. 38, ss. 59, 60, not applying to infant

married women; see sect. 61 (1).

(*e*) See *Re Wells*, 31 W. R. 764, W. N. 1883, p. 111; *Re Morgan*, 24 Ch. D. 111; *Re Newcastle's Estate*, ib. 129, 139, 140; *Re Sparrow's Settled Estate*, 1892, 1 Ch. 412; *Re Simpson*, 1897, 1 Ch. 256.

(*f*) Above, p. 304.

(*g*) Stat. 45 & 46 Vict. c. 38, s. 58.

exercise the powers so conferred, there being no trustees of the settlement, it is not necessary that such trustees should also be appointed in order that notice may be given to them of the intention to exercise the powers, and the persons so appointed may well exercise the powers, notwithstanding that there are no such trustees (*h*): but in that case any purchase or other capital money must be paid into Court, the persons so appointed having no authority to give a good receipt therefor (*i*). If, however, there be trustees of the settlement and the powers in question be exercised by them, it will lie in their option, as exercising the powers of a tenant for life, to direct the purchase or other capital money to be paid either to themselves, as trustees of the settlement, or into Court (*k*), and if they choose to direct payment to be made to themselves, their receipt will be a good discharge to the purchaser (*l*). And this is the case, not only where the infant has a life or other limited estate giving him the powers of a tenant for life of settled land, but also where he is seised in fee or otherwise absolutely entitled in possession, and trustees of the settlement deemed under sect. 59 of the Settled Land Act, 1882, to be existing are appointed by the Court (*m*).

At common law, the contracts of infants are generally voidable at their option (*n*), but are valid if beneficial to

Infants' contracts.

(*h*) See above, pp. 301 *sq.*

(*i*) *Re Dudley's Contract*, 35 Ch. D. 338; see above, p. 301.

(*k*) Stat. 45 & 46 Vict. c. 38, ss. 22 (1), 60; above, p. 301.

(*l*) See *Re Newcastle's Estates*, 24 Ch. D. 129, 137–140, 142; 1 Key & Elph. Prec. Conv. 521, n. (*b*), 4th ed.; 514, n. (*b*), 8th ed.

(*m*) See *Re Dudley's Contract*, 35 Ch. D. 338, 342, 344; *Re Simpson*, 1897, 1 Ch. 256, 259.

(*n*) *Warwick v. Bennet*, 2 M. & S. 205, 6 Taunt. 118; *Williams*

v. Moor, 11 M. & W. 256; *Carter v. Silber*, 1892, 2 Ch. D. 278; affirmed nom. *Edwards v. Carter*, 1893, A. C. 360; *Stephenson v. Dudbridge & Co.*, 1904, 2 K. B. 225; *Nash v. Leman*, 1908, 2 K.B. 1, 11, 12. There is authority to the effect that a unilateral contract by an infant entirely to his own detriment is absolutely void: but it is doubtful whether this means anything more than that it is void as against him, *i.e.*, that he cannot be obliged to perform it.

Infants
Relief Act,
1874.

the infant in the opinion of the Court (*o*), especially contracts for necessities, or whatsoever things are reasonably necessary for the use of the infant according to his circumstances and condition of life (*p*). But by the 1st section of the Infants Relief Act, 1874 (*q*), all contracts thenceforth entered into by infants for the repayment of money lent or to be lent (*r*) or for goods supplied or to be supplied (other than contracts for necessities) and all accounts stated with infants shall be absolutely void : provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter, except such as now by law are voidable. And by the 2nd section, no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted

though he may do so, if he likes ; see *Whelpdale's case*, 5 Rep. 119 ; *Sanderson v. Marr*, 1 H. Bl. 75 ; *Boyles v. Dinely*, 3 M. & S. 477 ; *Kingsman v. Kingsman*, 6 Q. B. D. 122, 127.

(*o*), *Clements v. London and North Western Ry. Co.*, 1894, 2 Q. B. 482 ; *Bromley v. Smith*, 1909, 2 K.B. 235.

(*p*) *Ryder v. Wombwell*, L. R. 4 Ex. 32 ; *Johnstone v. Marks*, 19 Q. B. D. 509 ; *Walter v. Errard*, 1891, 2 Q. B. 369 ; *Nash v. Inman*, 1908, 2 K. B. 1. It may be noted that the law does not go beyond allowing infants' contracts to pay for necessities supplied to be good. An infant's conveyance, charge, bill, or note, which would otherwise be voidable or void, is not made valid by the fact that it was made or given in consideration of the supply of necessities ; *Martin v. Gale*, 4 Ch. D. 428 ; *Re Soltykoff*, 1891, 1 Q. B. 413. Persons who have furnished an infant with money to buy necessities are, however, entitled in equity to stand, by subrogation,

in the place of those who supplied the necessities ; *Marlow v. Pitfield*, 1 P. W. 558.

(*q*) Stat. 37 & 38 Vict. c. 62.

(*r*) By the Betting and Loans (Infants) Act, 1892, stat. 55 Vict. c. 4, s. 5, if any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever ; and for the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan.

during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. The first section of this Act makes void the particular contracts therein specified only (*s*). The second section, prohibiting any action upon the *ratification* of an infant's contract (*t*), is held to apply to *all* contracts, of which before the Act the burthen of proving a ratification after full age (*u*) lay upon the party, who sought to enforce them (*x*). These are all contracts, as to which under the old practice a plea of infancy merely was a sufficient plea in bar of an action to enforce them, and the plaintiff could not recover unless he set up and maintained a plea of ratification after attaining full age by way of replication (*y*). Such were contracts executory on both sides, whether to be performed during infancy or afterwards, and contracts to be performed by the infant, either within age or afterwards, in consideration of some fleeting benefit executed in his favour, as the supply of money or of goods other than necessities (*y*). There

(*s*). *Duncan v. Dixon*, 41 Ch. D. 211.

(*t*) This enactment does not prevent the parties to a contract made in the infancy of one of them from making a new contract to the same effect after the infant is come of age; see *Northcote v. Doughty*, 4 C. P. D. 385; *Ditcham v. Worrall*, 5 C. P. D. 410.

(*u*) By Lord Tenterden's Act, stat. 9 Geo. IV. c. 14, s. 5, no action should be maintained to charge any person upon any promise made after full age to pay any debt contracted during infancy or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification were made by some writing signed by the party to be charged therewith. This enact-

ment was superseded by s. 2 of the Infants Relief Act, 1874, and repealed by stat. 38 & 39 Vict. c. 66.

(*x*) *Expte. Kibble*, L. R. 10 Ch. 373; *Coxhead v. Mullis*, 3 C. P. D. 439.

(*y*) The burthen of proving infancy lay upon the party who pleaded it, but if this were established, the *onus* of proving ratification was upon the party who set up that plea; see *Borthwick v. Carruthers*, 1 T. R. 648; *Cohen v. Armstrong*, 1 M. & S. 724; *Hunt v. Massey*, 5 B. & Ad. 902; *Hartley v. Wharton*, 11 A. & E. 934; *Williams v. Moor*, 11 M. & W. 258; *Harris v. Wall*, 1 Ex. 122; *North Western Ry. Co. v. McMichael*, 5 Ex. 114, 125, 126; Chitty on Pleading, i. 607, iii. 33, 170, 177, 426, 7th ed.

are, however, some contracts by infants which remain binding on them after they have attained full age, unless within a reasonable time after coming of age they repudiate them and give notice of such repudiation to the other party; and the party who sues an infant on one of these contracts has, *prima facie*, a good cause of action and was not obliged to prove ratification as a condition precedent to charging the infant thereon (z). Of this kind are contracts, by which a permanent interest in property is immediately conferred on the infant, and he himself is laid in return under a continuing obligation (a) to be performed partly or wholly after he has attained full age. Instances of this class of contract are the acceptance by an infant of some permanent property, to which a liability is incident, as where he takes a lease of land at a rent (b) or shares not fully paid up in a company (c). And the same principle has been applied where an infant has by his marriage settlement taken a permanent interest in property and entered into a covenant, which may operate as a disposition of property in equity; as to settle some property to be afterwards acquired by him (d). In these cases, if the infant wish to escape liability on the contract, he must repudiate it and renounce all benefit thereunder and duly communicate (e) his repudiation to the other party within a reasonable time after coming of age. For these contracts remain good until set aside; and if the infant omit so to avoid them, they will be perfectly

(z) See *Grady v. Harrison*, 5 B. & A. 147.

(a) See *Grady v. Harrison*, 5 B. & A. 147.

(b) *Hyatt's case*, Cro. Jac. 320; and see *Hobbes v. Blogg*, 8 Taunt. 35.

(c) *Cyph and Bunden Ry. Co. v. Cusance*, 10 Q. B. 939; *North London Ry. Co. v. McMichael*, 7 E.L. 111; *Twissden's case*, L. R.

4 Ch. 31; *Ebbetts' case*, L. R. 5 Ch. 392.

(d) *Donnan v. Dixon*, 44 Ch. D. 211, 214; *Carter v. Silber*, 1892, 2 Ch. 278; affirmed, nom. *Edwards v. Carter*, 1893, A. C. 360; and see *Re Reis*, 1904, 2 K. B. 769, as to the nature of contracts of this kind.

(e) See above, p. 828.

binding on him, and the Infants Relief Act will be no bar to an action to enforce them (*f*).

As a rule, when an infant makes a contract which is voidable at his option, the other party is firmly bound, and the infant can enforce the contract either during infancy or afterwards (*g*). But an infant cannot enforce during infancy the specific performance of any contract made by him, on account of the want of mutuality of remedy between the other party and himself (*h*). It appears, however, that formerly an infant might successfully sue on attaining full age for specific performance of a contract made in infancy and originally voidable by him; for to maintain such an action he must have submitted to perform his part of the contract, and that would have been an affirmation of his liability thereunder and would have rendered the remedy mutual (*i*). But it seems that, since the Infants Relief Act, 1874 (*k*), an infant can no longer enforce the specific performance of such a contract after attaining full age, unless the contract be one of the continuing kind, which remain binding on him unless he avoid them (*l*). For in all other cases he cannot now bind himself by ratification of the contract; and so there can be no mutuality of remedy.

The other party to an infant's contract is bound.

Infant cannot enforce specific performance.

To apply these principles to sales of land:—A com-

Completed sale of land by infant.

(*f*) *Carter v. Silber*, 1892, 2 Ch. 278, 284; affirmed, 1893, A. C. 360; and see *Viditz v. O'Hagan*, 1900, 2 Ch. 87, 96—100.

(*g*) *Warwick v. Bruce*, 2 M. & S. 205, 6 Taunt. 205.

(*h*) *Flight v. Bolland*, 4 Russ. 298; *Lumley v. Ravenscroft*, 1895, 1 Q. B. 683; see below, Chap. XIX. § 3.

(*i*) See *Clayton v. Ashburn*, 9 Vin. Abr. 393; 2 Dart, V. & P. 1044, 5th ed.; 1161, 6th ed.; Fry, Sp. Perf. § 460, n. The same principle seems applicable

as that on which contracts for the sale of land signed *only* by one party were held to be specifically enforceable against him, notwithstanding the original want of mutuality: *Child v. Cumber*, 3 Swanst. 423, n.; *Ston v. Shole*, 7 Ves. 265, 275; *Finch v. Freeman*, 9 Ves. 351; *Western v. Russell*, 3 V. & B. 187, 192; *Flight v. Bolland*, 4 Russ. 298, 301; Fry, Sp. Perf. § 471; see below, Chap. XIX. § 3.

k) Above, p. 880.

l) Above, pp. 881, 882.

Completed
purchase of
land by
infant.

pleted sale of land by an infant is, as a rule, voidable at his option (*m*); he may recover the land, and it appears that, in the absence of fraud, he cannot be obliged to repay the purchase money (*n*). But if he fraudulently represented himself to be of full age, he would in equity be restrained from recovering the land without refunding the price (*o*). A completed purchase of land by an infant is voidable at his option in the sense that he may disclaim the estate (*p*), and so escape any liability incident thereto; as the liability for the rent and covenants, if the land bought were leasehold (*q*). But it is doubtful whether he can in any case recover the price paid. He certainly cannot do so unless he be in a position to make entire restitution; for it is established that, if this condition cannot be complied with, an infant cannot recover money paid for the purchase of things which are not necessities (*r*). Thus if he pur-

(*m*) Above, pp. 871 *sq.*

(*n*) See *Johnson v. Pic*, 1 Keb. 905, 913, where it appears that the infant had avoided a mortgage made by him; *Stikeman v. Dawson*, 1 De G. & S. 113; *Thurston v. Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 12, 13; affirmed, 1903, A. C. 6; above, p. 872. It is true that in the last-mentioned case the mortgage was made void *ab initio* by statute. But that does not appear to make any difference. Where an infant's conveyance is voidable at his option, it becomes absolutely void when he chooses to repudiate it; above, p. 872. And where the law declares that a man's conveyance is void as against him, equity will not, in the absence of fraud, impose terms of restitution or payment as a condition of his exercising his legal right to recover possession of the property; see *Chapman v. Michelson*, 1909, 1 Ch. 238. Otherwise the protection which the law accords to infants would be effectually defeated. And since the law regards

the protection of infants against their natural want of discretion as of such paramount importance that it will not lay an infant under an obligation *ex delicto* to repay money obtained under a contract induced by the infant's fraud (see *Johnson v. Pic*, *ubi sup.*; *Jennings v. Randall*, 8 T. R. 335, 337), it does not appear that, where money is paid to an infant under a contract in the belief, *not* induced by his fraud, that he is of full age, the law imposes on him any obligation *quasi ex contractu* to repay the money as having been parted with under a mistake of fact. Cf. the law applied in the case of contracts made with married women and induced by their fraud; see below.

(*o*) Above, pp. 873, 874.

(*p*) Above, pp. 870, 871.

(*q*) *Holmes v. Blogg*, 8 Taunt. 508, 509.

(*r*) *Holmes v. Blogg*, 8 Taunt. 508; *Valentini v. Canali*, 21 Q. B. D. 166.

chase leasehold land, which is a wasting property, he cannot recover the price paid for it (*s*). It is not certain, however, that if an infant buy land held in fee, he cannot avoid the purchase and also recover the price. For the reason why an infant has been held to be debarred from recovering money paid by him on a purchase, seems to be that he could not put the other party in the same position as before (*t*); and we have seen that in the case of a purchase of land induced by fraud, mere occupation of the land sold is not considered to be a bar to *restitutio in integrum*, so long as the land has not been so wasted that the depreciation in value could not properly be met by paying compensation in money (*u*). There seems therefore to be ground for contending that an infant may in like case recover his purchase money (*x*). It appears too that, if there were a total failure of consideration on the purchase of land by an infant—as if the vendor had no title, and the infant were instantly ejected—the infant might recover the price paid (*y*). If an infant buy land without paying the whole or part of the purchase money, he holds the land subject to the vendor's lien thereon for the amount unpaid (*z*); and if land bought by an infant be paid for with money advanced to him by another person for the purpose, the lender is entitled by subrogation to the same lien as the vendor would have had, if he had remained unpaid (*a*). If an infant contract to sell or buy land, the contract appears to be voidable at his option (*b*). The other party is completely bound

Infant's contract to buy or sell land.

(*s*) *Holmes v. Blogg*, 8 Taunt. 508.

(*t*) See cases cited above, n. (*r*), p. 884; *Hamilton v. Vaughan-Sherrin, &c. Co.*, 1894, 3 Ch. 589, 592—594.

(*u*) Above, pp. 829, 830, 836, 837.

(*x*) See 1 Dart, V. & P. 27, 5th ed.; 31, 6th ed.; 33, 7th ed.

(*y*) *Hamilton v. Vaughan-Sherrin, &c. Co.*, 1894, 3 Ch. 589; see above, p. 871, n. (*m*).

W.—11.

(*z*) Above, p. 506, n. (*ac*).

(*a*) *Theobald v. Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 1905, A. C. 6.

(*b*) Above, p. 879. It is conceivable that the purchase of land by an infant may be a contract for necessities, as if he required a residence and could obtain one in no other way; but this would be an exceptional case.

at law, but the infant cannot enforce the specific performance of the contract, either during infancy, or (it seems) after attaining twenty-one (*c*). And the other party cannot effectually sue the infant on any ratification of the contract made by him after coming of age (*d*). It does not appear that an infant's contract to pay after attaining full age, either wholly or partly and either at one time or by instalments, for land bought by and conveyed to him in infancy would be such a contract as would be binding on him after coming of age unless he repudiated it within a reasonable time thereafter (*e*). Thus if in such case the vendor waived his lien and accepted the infant's personal liability or his promissory note or notes for such payment, it is thought that, apart from the Infants Relief Act, the *onus* of proving a ratification of the contract would fall on the vendor, and so that Act would deprive him of any remedy for the recovery of the money (*f*). It has been held that, if an infant contract to buy land and pay a deposit, and afterwards refuse to complete the purchase, he cannot recover the deposit, unless he can show that the contract was induced by the vendor's fraud (*g*). But it is submitted that this decision is open to be reviewed in the light of the principle established as above mentioned, that where an infant pays money for the purchase of other things than necessaries, he cannot recover it *if he be not in a position to make entire restitution to the seller* (*h*); and that, according to later cases, if an infant pay away money without getting the *possession* or substantial enjoyment of anything in return, the payment is voidable and the money recoverable (*i*).

Recovery of
deposit by
infant
avoiding his
contract to
buy land.

(*c*) Above, pp. 882, 883.

(*d*) Above, p. 881.

(*e*) See above, p. 882.

(*f*) Above, pp. 880, 881, and
n. *ii*.

(*g*) *Wilson v. Kearse*, Peake,
Add. Cas. 196. See also *Eyre*,

Taylor, 8 De G. M. & G. 254,
where note that payments had
been made to the infant under
the contract; and cf. *Corpe v.*
Occleston, 10 Bing. 252.

(*h*) Above, p. 884.

(*i*) Above, pp. 871, n. (*m*), 885,

According to modern law, the act *in pais* (*k*) of a person who is so insane as to be incapable of understanding its effect, is void, if it be purely gratuitous (*l*): it is voidable, if it be done for valuable consideration under agreement with some person who was aware of his insanity (*m*); and it is valid, if it be done for valuable consideration under agreement with some person dealing with him in good faith and without knowledge of or reasonable cause to suspect his insanity (*n*). This doctrine applies to all dispositions of property as well as to all contracts made by an insane person, and so governs his *purchase* and conveyance of land equally with his contract to sell or buy it (*o*). And it has not only been held that the *promise* of an insane person made for valuable consideration *paid or executed* in good faith without notice of his insanity is at law enforceable against him, but it has also been laid down that the same doctrine is applicable whether the *contract* be executed or executory (*p*). As yet, however, it has not been precisely decided whether or how far a contract made in good faith with an insane person without

Persons of
unsound
mind.

(*k*) See above, p. 871, n. (*l*).

(*l*) *Elliot v. Ince*, 7 De G. M. & G. 475; *Manning v. Gill*, L. R. 13 Eq. 485; see also *Clerk v. Clerk*, 2 Vern. 412; *Eggle, Roberts*, 3 Atk. 368, 312, 313. But it seems that the delivery by such a person of any chattel, wherein the property passes by delivery, must be voidable only, as was an insane person's feoffment with livery of seisin before the year 1845; *Thompson v. Leech*, 3 Salk. 300, 301; Bac. Abr. Idiots and Lunatics (P); Sug. Pow. 604, 605, 8th ed.; cf. above, p. 871, n. (*m*). As to a power of attorney given by an insane person, see *A. G. v. Parnter*, 3 Bro. C. C. 441, 4 Bro. C. C. 409; *Daily Telegraph Newspaper Co. v. McLaughlin*, 1904, A. C. 776; and as to the degree of mental

capacity necessary to make a valid will, see *Booke v. Goodfellow*, L. R. 5 Q. B. 549; *Smee v. Smee*, 5 P. D. 81. A lunatic so found by inquisition cannot, so long as the inquisition continues in force, validly dispose of his property by deed during a lucid interval; *Re Walker*, 1905, 1 Ch. 160.

(*m*) See *Matthews v. Baxter*, L. R. 8 Ex. 132; Pollock on Contract, 94, 7th ed.

(*n*) *Molton v. Camroux*, 2 Ex. 487, 4 Ex. 17; *Imperial Loan Co. v. Stone*, 1892, 1 Q. B. 599.

(*o*) See *Price v. Berrington*, 3 Mac. & G. 486; *Elliot v. Ince*, 7 De G. M. & G. 475, 487, 488; Sug. Pow. 604, 605, 8th ed.

(*p*) *Imperial Loan Co. v. Stone*, 1892, 1 Q. B. 599.

notice of his insanity is enforceable against him, where the consideration is executory on both sides and consists of mutual promises. But it seems to be no objection that the consideration given in the insane man's favour is executory only; for if he make a conveyance of his property in consideration of some promise made to him by a person acting in good faith and without notice of his insanity, the conveyance is held to be valid and irrevocable (*q*). It appears, therefore, that an insane man's contract is valid at law, if the other party enter into it in good faith and in ignorance of his insanity, notwithstanding that it consist of mutual promises only. It follows from what has been said above that an insane person is under no incapacity to hold land.

Who may
avoid an
insane man's
voidable act.

Where the *purchase*, conveyance or contract of a person of unsound mind is voidable, it may be affirmed or avoided by himself if he recover his senses (*r*), or by his representatives after his death if he die insane, or die sane but without having affirmed the transaction (*s*). An insane man's voidable contract may also be avoided during his insanity; for if he be sued thereon, as he may be (*t*), his committee or guardian *ad litem* may defend the action on his behalf (*u*), and may plead his insanity, coupled with the plaintiff's knowledge thereof at the time of making the contract; and this plea, if proved, will bar the action (*x*). And as an insane person may sue, if found lunatic by inquisition, by his committee, and otherwise by his next friend (*y*), to

^q *q. Molton v. Camroux*, 2 Ex. 487. 4 Ex. 17; *Beavan v. McDonnell*, 9 Ex. 309.

^r *r. Molton v. Camroux*, ubi sup.; Sug. Pow. 605, 8th ed.

^s *s. Co. Litt.* 2b; 2 Black. Comm. 291; *Bennet v. Vade*, 2 Atk. 324; *Frank v. Mainwaring*, 2 Beav. 115.

^t Insane persons are not exempt from being sued; see *Owen v. Jones*, 1 Ves. sen. 82; *Brookwell*

v. Bullock, 22 Q. B. D. 567; and as to execution against their property, *Re Clarke*, 1898, 1 Ch. 336; *Re Brown*, 1900, 1 Ch. 489; *Re Seager Hunt*, 1900, 2 Ch. 54, n.

^u R. S. C. 1883, Order XVI. rule 17.

^x See *Imperial Loan Co. v. Stone*, 1892, 1 Q. B. 599.

^y R. S. C. 1883, Order XVI. rule 17. The committee should obtain the sanction of the Master

obtain any remedy which he might assert, if sane, in person (*z*), active proceedings may be so taken on his behalf during his insanity to set aside any voidable *purchase*, conveyance or contract taken or made by him (*a*). In the case of lunatics so found by inquisition the Court in Lunacy has jurisdiction to elect on their behalf to avoid or confirm any voidable *purchase*, conveyance or contract made by them, and will exercise this jurisdiction as may be best for the lunatic's benefit (*b*). And the High Court has the like jurisdiction to elect on behalf of insane persons not so found (*c*).

It thus appears that, if an insane person contract to sell or buy land, the contract will be voidable or valid, according as the other party had or had not knowledge of the insanity (*d*). It has not been decided, since this doctrine was established, whether the Court will make an order for the specific performance by an insane person of a valid contract made by him during his insanity. Under the old law, which regarded all lunatics' contracts as void (*e*), the Court of Chancery

Insane man's contract to buy or sell land.

Whether specific performance by the lunatic will be ordered.

in Lunacy before suing; see *Re Hinchcliffe*, 73 L. T. 522; but the next friend need not do so; see next note. The committee so suing must be made a co-plaintiff; *Re Lord Tavasham's Settlement*, 1908, 1 Ch. 201.

(*z*) *Dudishkin v. London and Westminster Bank*, 1900, 2 Ch. 15, 43; *New York, &c. Co. v. Keyser*, 1901, 1 Ch. 666; see also Pope on Lunacy, 329, 2nd ed.; *Coppendale v. Sunderland*, Barnes, 42; *Jones v. Lloyd*, L. R. 18 Eq. 265; *Wilder v. Pigott*, 22 Ch. D. 263, 268; *Porter v. Porter*, 37 Ch. D. 420.

(*a*) *Fisher v. Melles*, L. R. 18 Eq. 268, n.; *Re Gordon*, L. R. 10 Ch. 192.

(*b*) Bac. Abr. Idiots (D, F);

Sergeson v. Sealey, 2 Atk. 412; *Re Sefton*, 1898, 2 Ch. 378; *Baldwyn v. Smith*, 1900, 1 Ch. 588.

(*c*) *Wilder v. Pigott*, 22 Ch. D. 263, 268.

(*d*) Above, pp. 887, 888; see *Sergeson v. Sealey*, 2 Atk. 412; *Baldwyn v. Smith*, 1900, 1 Ch. 588, where it does not appear whether the other party was aware of the insanity or not. The learned judge's dictum that the contract was voidable must be confined to the case of a contract made with knowledge of the insanity; see above, p. 888.

(*e*) *Thompson v. Leech*, 3 Salk. 300, 301; Bac. Abr. Idiots (F); *Niell v. Morley*, 9 Ves. 478, 481, 482.

would not decree the specific performance by a lunatic of a contract made whilst he was of unsound mind (*f*) ; and apparently it would order the rescission of an executory contract made by a lunatic and remaining unperformed (*g*) : but it would not interfere to set aside a contract made by a lunatic with one, who had no knowledge of his insanity, where the contract had been partly performed (*h*). The Court would, however, order the specific performance by a lunatic of a contract made whilst he was of sound mind (*i*). It is therefore submitted that, as lunatics' contracts made with persons dealing with them in good faith and without knowledge of their insanity are now recognised as valid at law, whether the contract be executed or executory (*k*), the Court should now enforce the specific performance by lunatics of such contracts ; for under the old law and practice it was the supposed invalidity of the contract (*l*), and not the defendant's lunacy at the time of the proceedings to enforce it specifically, which prevented the Court from granting this relief. If a lunatic make a valid or voidable contract for the sale or purchase of land, and be so found by inquisition, the transaction may be confirmed and carried out, under the present practice, by order of the Master in Lunacy (*m*) ; and if the lunatic were the vendor, the land may be conveyed on completion of the contract by his committee

(*f*) *Hall v. Warren*, 9 Ves. 605.
 (*g*) *Noll v. Morley*, 9 Ves. 478, 481 ; *Frost v. Bourne*, 22 L. J. Ch. 638 ; as to which, see 1 Dart, V. & P. 6, n. (*a*), 5th ed. : 7, n. (*h*), 6th ed. : 7, n. *a*, 7th ed.

(*h*) *Noll v. Morley*, 9 Ves. 478.
 (*i*) *Green v. Davies*, 1 Ves. sen. 82 ; above, p. 560.

(*k*) Above, p. 887.

(*l*) See above, p. 889.

(*m*) See stats. 53 Vict. c. 5, s. 120, authorising orders for sale of lunatic's property to be made ;

54 & 55 Vict. c. 65, s. 27 (1) ; *Re Smith*, L. R. 10 Ch. 79 ; *Baldwyn v. Smith*, 1900, 1 Ch. 588. It may be noted that if the Court in Lunacy confirm a lunatic's voidable contract for the sale or purchase of land, the lunatic's representatives will take the property, which is the fruit of the contract, in its converted state as personalty or realty ; *Sergeson v. Sealay*, 2 Atk. 412 ; *Baldwyn v. Smith*, ubi sup.

acting under the Master's order on his behalf (*n*). If the lunatic be not so found by inquisition, but be a person, to whom the powers of management and administration given by the Lunacy Act, 1890 (*o*), apply, and were the vendor, the contract may be carried out in effect, if an order of the Master in Lunacy can be obtained for sale of the land and for its conveyance by such person as he shall direct (*p*). But it does not appear that this Act confers any jurisdiction to order the performance of contracts made during their insanity by lunatics not so found; it only authorises orders directing the performance of their contracts made before their lunacy (*q*). And as regards lunatics not so found, it appears that the Court in Lunacy has no more than the jurisdiction expressly conferred upon it by the Lunacy Act, 1890 (*r*); although as regards lunatics so found by inquisition this Court is not limited to the powers so given, but may exercise the powers which it derives from the Royal prerogative (*s*) concerning lunatics and the management of their property (*t*). If therefore the Court in Lunacy will not make the order for sale, the purchaser will have no remedy but to sue for specific performance of the contract, and for an order that on payment of the purchase money the vendor may be declared a trustee and the land sold vested in himself (*u*). If the lunatic were the purchaser and be a person, to whom the above-mentioned powers of management are applicable, the contract may, it seems, be completed under an order of the Master in

(*n*) See stat. 53 Vict. c. 5, s. 124; above, pp. 560, 561.

(*o*) Stat. 53 Vict. c. 5, s. 116 (1); above, p. 560.

(*p*) See stats. 53 Vict. c. 5, ss. 116 (2), 120, 124; 54 & 55 Vict. c. 65, s. 27 (1); above, pp. 560, 561.

(*q*) Stat. 53 Vict. c. 5, s. 120 (1); above, p. 560.

(*r*) Above, n. (*p*); see *Re Buggs*, 1894, 2 Ch. 416, n.; *Didisheim v. London and Westminster Bank*, 1900, 2 Ch. 15, 45; *Re Langdale*, 1901, 1 Ch. 3.

(*s*) Bac. Abr. Idiots (C); 1 Black. Comm. 303 sq.

(*t*) *Re Setton*, 1898, 2 Ch. 378.

(*u*) See above, p. 537, n., 3 Seton on Judgments, 2287, 6th ed.

Lunacy, who is authorised to sanction the payment of the lunatic's debts or engagements (*x*). If such an order cannot be obtained, the vendor will be obliged to assert his rights by action.

Subsequent conveyance over for value without notice does not validate a lunatic's voidable conveyance.

Although a lunatic's conveyance made for valuable consideration to a person dealing with him in good faith and without notice of his insanity is valid (*y*), it does not appear that, where a lunatic's conveyance was originally voidable (*z*), it will be made valid by a subsequent conveyance from the alienee to a purchaser for value taking from him without notice of the lunacy. In this respect a lunatic's voidable conveyance seems to stand on the same footing as an infant's, the estate in the land conveyed revesting immediately on the avoidance of the lunatic's act without any necessity for a reconveyance (*a*). And it is thought that, as in the case of conveyance by an infant (*b*), if a lunatic's voidable conveyance be avoided, the property thereby assured can be recovered without refunding any purchase money or other consideration received for making the conveyance. It appears, however, that where a lunatic's voidable conveyance has been made to persons who, acting in good faith with the sole object of securing his benefit, have incurred expenses or liabilities for his use in consideration thereof, the Court will, under its equitable jurisdiction, impose proper terms to secure their

See Stat. 53 Vict. c. 5, s. 117; below, p. 893.

yo Above, p. 887. The ground of this rule of modern law seems to be that, if an insane man so conduct himself as to appear sane to a person of ordinary intelligence, he shall be estopped from alleging his insanity. Cf. the *error of mistake*, above, p. 750.

(*z*) Above, p. 887.

(*a*) Above, pp. 872, 873. It is thought that the doctrine of a

voidable conveyance being rendered unimpeachable by a subsequent conveyance to a purchaser for value without notice applies only where the first conveyance effectually passes the assessor's estate, leaving in him nothing but a right of action to set it aside, so that a re-conveyance is necessary, if the transaction be avoided; see above, pp. 756, 801, 873, n. (*a*).

(*b*) Above, p. 884.

indemnity before lending its aid to set aside the conveyance or recover the property assured (*e*).

With respect to the sale of insane persons' lands irrespective of their own contracts to sell them, the Court in Lunacy may by order authorise the sale of any property belonging to any lunatic, to whom the powers of administration given by the Lunacy Act, 1890 (*d*), apply. And the Court may also order that any property of any such lunatic be sold, charged, mortgaged, dealt with or disposed of as the Court thinks most expedient for the purpose of raising or securing, or repaying with or without interest, money which is to be or which has been applied to all or any of the purposes following:—(1) Payment of the lunatic's debts or engagements; (2) discharge of any incumbrance on his property; (3) payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit; (4) payment of or provision for the expenses of his future maintenance (*e*). Under these powers, a lunatic's land may be sold in consideration of a rent-charge (*f*). But the simple power of sale given by sect. 120 of the Act does not authorise a sale in consideration of the receipt of shares in a company (*g*). Where a lunatic's lands are sold under the powers of this Act, the conveyance is executed on the lunatic's behalf by his committee, if he be found a lunatic by inquisition, or by such person as the Court approves; and if so executed, will be effectual to convey the lunatic's estate therein (*h*). And the committee or such person may enter into the usual covenants for title on the lunatic's behalf, or, it seems, into any other cove-

Sale of lunatic's lands irrespective of their contracts to sell them.

(*e*) *Selby v. Jackson*, 6 Beav. 192, 201. Cf. above, p. 873.

(*d*) Stat. 53 Vict. c. 5, ss. 116

(1), 120 (a); above, p. 560.

(*e*) Stat. 53 Vict. c. 5, s. 117 (1).

(*f*) *Re Ware*, 1892, 1 Ch. 344.

(*g*) *Re A. B.*, 1899, W. N. 233. Cf. above, p. 267.

(*h*) See stat. 53 Vict. c. 5, ss. 116 (2), 124; above, pp. 560, 561.

Exercise of
powers on
behalf of
lunatics.

nants, which it would be usual and proper for the vendor to make (*i*). The Court in Lunacy is also empowered by order to authorise the committee of a lunatic so found, or such person as the Court appoints in the case of other lunatics mentioned in the Lunacy Act, 1890 (*k*), to exercise any power or give any consent required for the exercise of any power, where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic (*l*); and also to exercise any power vested in the lunatic in the character of trustee or guardian, or give any consent of the lunatic necessary in the like character to the exercise of a power or as a check upon the undue exercise of the power (*m*). These provisions enable a general power of appointment given to a lunatic, or an express power of sale of lands vested in him as a trustee (and as a trustee only) (*n*), or a power to appoint new trustees to be exercised on his behalf (*o*). But they do not enable the power of sale given by the Settled Land Act, 1882 (*p*), to be exercised on behalf of a lunatic not so found by inquisition (*q*). Nor do they authorise the exercise, on behalf of a lunatic tenant for life not so found, of the power of sale given by section 7 of the Lands Clauses Act, 1845 (*r*), or of a liberty given to him by the settlement to consent to the sale of

As to the
power of
sale under the
Settled Land
Act, 1882.

*See now
may act
s. 85. l.*

i *Re Ray*, 1896, 1 Ch. 468.

(*k*) Above, pp. 560, 561.

(*l*) Stat. 53 Vict. c. 5, s. 120 (*l*).

(*m*) Sect. 128. See as to a power to appoint among children, *Re A.*, 1904, 2 Ch. 328; and as to the release of a power, *Re Horst*, 1892, W. N. 177; *Re Rose*, 1894, 2 Ch. 348, 353.

(*n*) See *Re X.*, 1894, 2 Ch. 415, and the criticisms on that decision in *Re S. S. B.*, 1906, 1 Ch. 712.

o *Re Shortridge*, 1895, 1 Ch. 278; *Re Fuller*, 1900, 2 Ch. 551.

p Above, pp. 300 *sq.*

q *Re Baggs*, 1894, 2 Ch. 416,

n., approved, *Re S. S. B.*, 1906, 1 Ch. 712. But it has been held that the powers of leasing given by the Settled Land Act, 1882, may be so exercised on behalf of a lunatic; as the Lunacy Act, 1890, expressly authorises the execution of any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends; stat. 53 Vict. c. 5, s. 120 (*h*); *Re Salt*, 1896, 1 Ch. 117; see *Re S. S. B.*, *ubi sup.*

(*r*) Stat. 8 & 9 Vict. c. 18; *Re S. S. B.*, 1906, 1 Ch. 712.

the settled land by trustees under a power exercisable with his consent (*s*), or (as it now appears) of a power of sale given to him, as such tenant for life, by the settlement (*t*). By the Settled Land Act, 1882 (*u*), where a tenant for life, or a person having the powers of a tenant for life under that Act is a lunatic *so found by inquisition*, the committee of his estate may, under an order of the Court in Lunacy (*x*), exercise on his behalf the powers of a tenant for life under that Act. In all the above-mentioned matters, the jurisdiction of the Court in Lunacy is now exercisable by the Masters (*y*).

The act *in pais* (*z*) of a man, who is so drunk as to be incapable of understanding its effect, is governed by the same law as the act of an insane person (*a*). Where a drunken man's act is done for valuable consideration under agreement with some other person, it is voidable at his option, if the other knew of his condition: but it is valid, if the other were not aware of and had no reasonable cause to suspect his defective state of mind and dealt with him in good faith. This doctrine is applicable to a drunken person's *purchase* or conveyance of land, and to his contract to sell or buy land (*b*). It is, however, questionable whether a drunken man's gratuitous conveyance is absolutely void, as a lunatic's is (*c*); for it seems that he might confirm it when sober (*d*).

Drunken persons.

s. *Re De Moleyns and Harris' Contract*, 1908, 1 Ch. 110.

t. See *Re N. S. B.*, 1906, 1 Ch. 712, 717—719, 720, 724, 729, discrediting the decision in *Re X.*, 1894, 2 Ch. 415.

u. Stat. 45 & 46 Vict. c. 38, s. 62; *Re Rugg*, 1896, 1 Ch. 468.

x. See stat. 53 Vict. c. 5, s. 108.

y. Stat. 54 & 55 Vict. c. 65,

s. 27, 1; *Re Langdale*, 1901, 1 Ch. 3, 7.

z. See above, p. 871, n. *l*.

a. Above, p. 887.

b. See *Matthews v. Baxter*, L. R. 8 Ex. 132; and cases cited above, p. 887, n. *o*.

c. Above, p. 887.

d. See *Molton v. Cammings*, 4 Ex. 17, 19; *Matthews v. Baxter*, ubi sup.

Convicts.

Convicts, or persons against whom judgment of death or penal servitude has been pronounced or recorded for treason or felony (*e*), are not under any incapacity to purchase land (*f*). And since the Forfeiture Act, 1870 (*g*), which abolished all attainder, forfeiture or escheat upon judgment for treason or felony, convicts may hold land. But by the same Act (*h*), convicts are incapable, while subject to the operation of the Act, of alienating or charging any property, or of making any contract, and are prohibited from bringing any action at law or in equity for the recovery of any property, debt or damage whatsoever. All these disabilities on the part of a convict are, however, suspended while he is lawfully at large under any license (*i*). By the same Act, an administrator of any convict's property may be appointed by the Crown (*k*); and upon such appointment all the real and personal property to which the convict was at the time of his conviction or shall while subject to the Act become entitled, shall vest in the administrator (*l*). The administrator has absolute power to let, mortgage, sell, convey and transfer any part of such property as to him shall seem fit (*m*). It is, however, provided that no property acquired by a convict while he is lawfully at large under any license shall vest in his administrator, but the convict shall be entitled thereto without

(*e*) See stat. 33 & 34 Vict. c. 23, s. 6.

(*f*) See Co. Litt. 2b; Sug. V. & P. 685.

(*g*) Stat. 33 & 34 Vict. c. 23, s. 1. Conveyancers investigating title prior to the commencement of this Act, which was passed on the 4th of July, 1870, should not forget that it may be necessary to take account of the previous law in this respect; as to which, see Wms. Real Prop. 48, 56, 300, 21st ed., and authorities there cited.

(*h*) Sect. 8; above, p. 561.

(*i*) Stat. 33 & 34 Vict. c. 23, s. 30.

(*k*) Sect. 9.

(*l*) Sect. 10. Property vested in a convict on any trust or by way of mortgage is excepted: stat. 56 & 57 Vict. c. 53, s. 48.

(*m*) Sect. 12: *Carr v. Anderson*, 1903, 2 Ch. 279. The administrator has no power to bar the convict's estate tail, but the convict himself can do so: *Re Gaskell and Walters' Contract*, 1906, 2 Ch. 1; see above, p. 532, n. *p*.

any interference on the administrator's part (*u*). Any property of the convict vested in his administrator reverts in the convict or his representatives on his ceasing to be subject to the operation of the Act (*o*); this occurs on his death, bankruptcy, completion of his term of punishment or pardon (*p*).

Outlawry is practically obsolete. Theoretically, however, a man may still be outlawed if he fly from justice upon criminal proceedings against him (*q*). Outlawry is a cause of forfeiture to the Crown of the outlawed person's goods and chattels, including his chattels real (*r*). An outlaw cannot therefore make any valid disposition of his chattels after the title of the Crown to have them has accrued; and any previous disposition of them made with intent to avoid the forfeiture will be void (*s*). Since the Forfeiture Act, 1870 (*t*), judgment of outlawry for treason or felony no longer entails any attainder, and does not occasion any escheat to the lord or forfeiture to the Crown of the outlaw's freehold or copyhold estates of inheritance (*u*). But an outlaw still forfeits the profits of his real estate while he lives (*x*). Outlaws are not disabled from *purchasing* lands (*y*); and, except as prevented by the above-mentioned law of forfeiture, they are now free to hold and dispose of

(*u*) Sect. 30.

(*o*) Sect. 18.

(*p*) Sect. 7.

(*q*) Short & Mellor's Crown Office Practice, 384; Wms. Pers. Prop. 96, and n. (*f*), 16th ed.

(*r*) Bac. Abr. Outlawry (D); 4 Black. Comm. 319, 387.

(*s*) See 3 Rep. 82b; 4 Black. Comm. 387, 388; *Perkins v. Bradley*, 1 Hare, 219, 227; *Chowen v. Baylis*, 31 Beav. 351, 356.

(*t*) Stat. 33 & 34 Vict. c. 23, s. 1; above, p. 896.

(*u*) See Wms. Real Prop. 48, 49, 56, 94, 110, n. (*u*), 191, 476, 21st ed. By the Forfeiture Act,

1870, stat. 33 & 34 Vict. c. 23, s. 1, it is provided that nothing therein shall affect the law of *forfeiture* consequent upon outlawry. But it is thought that this exception relates only to the law of forfeiture of goods, and not to the forfeiture of freeholds in fee on outlawry for high treason; for such forfeiture was a consequence of the outlaw's attainder: see Bac. Abr. Outlawry (D); 4 Black. Comm. 381—387.

(*x*) Bac. Abr. Outlawry (D); Short & Mellor's Crown Office Practice, 385.

(*y*) See Co. Litt. 2b.

them. Outlaws are capable of making contracts and may be sued thereon: but as they cannot appear in Court to enforce any remedy for their own benefit, except to reverse the outlawry (*z*), they cannot enforce their agreements (*a*).

Aliens.

At common law, aliens (*b*) might *purchase*, but were incapable of inheriting lands, or of holding any estate therein; save only a lease for years of a house occupied by a friendly alien merchant (*c*). And the conveyance of any other estate in land to or in trust for (*d*) an alien was a cause of forfeiture of the alien's interest to the Crown (*e*). Aliens were not, however, under any incapacity with respect to the acquisition, enjoyment or disposition of chattels personal (*f*). But since the Naturalization Act, 1870 (*g*), real and personal property of every description (*h*) may be taken, acquired, held

(*z*) *Aldridge v. Butler*, 2 M. & W. 412; *Re Mander*, 6 Q. B. 867, 873; *R. v. Love*, 8 Ex. 697.

(*a*) Above, p. 2.

(*b*) As to what persons are aliens, and as to denizens, see *Wms. Real Prop.* 301, and n. (*y*), 21st ed.

(*c*) *Co. Litt.* 2b. By stat. 7 & 8 Vict. c. 66, s. 5, a resident alien, the subject of a friendly state, might hold lands for any term not exceeding twenty-one years for the purposes of residence or business.

(*d*) *Burrow v. Wadkin*, 24 Beav. 1; *Sharp v. St. Sauveur*, L. R. 7 Ch. 343; overruling *Ritson v. Sturdy*, 3 Sm. & G. 230. But if lands were directed to be sold and the proceeds given to an alien, the Crown had then no claim: *De Haermetie v. Sheldon*, 1 Beav. 79, 4 My. & Cr. 525.

(*e*) *Co. Litt.* 2b; *Wms. Real Prop.* 302, 21st ed.

(*f*) *Calvin's case*, 7 Rep. 17a; *And.* 35; 1 Black. Comm. 372. It should, however, be noted that

when a war breaks out between this country and any foreign state, all rights of property or contract conferred by English law on any subject of that state are regarded in law as being liable to confiscation and are only enjoyed, if at all, by the license or permission of the Crown; 1 Black. Comm. 372; *Albrecht v. Sussmann*, 2 V. & B. 323, 327; *Clemontson v. Blessig*, 11 Ex. 135, 141; and cases cited above, p. 857, and in note (*n*), p. 899, below. And see *Wolff v. Osholm*, 6 M. & S. 92; Cockburn on Nationality, 150; Hall's International Law, § 144, pp. 453 sq., 4th ed.; *Hanger v. Abbott*, 6 Wallace, 532, 536, 537.

(*g*) Stat. 33 Vict. c. 14, s. 2, passed 12th May, 1870, and amended by stats. 33 & 34 Vict. c. 102; 35 & 36 Vict. c. 39; and 58 & 59 Vict. c. 43. This Act is not retrospective; *Sharp v. St. Sauveur*, L. R. 7 Ch. 343.

(*h*) Except British ships; stat. 33 Vict. c. 14, s. 14.

and disposed of by an alien in the same manner in all respects as by a natural-born British subject (*i*) ; and a title to real and personal property of every description may be derived through, from or in succession to an alien (*k*) in the same manner in all respects as through, from or in succession to a natural-born British subject. Aliens are not under any incapacity with respect to making contracts with British subjects; and friendly aliens may bring actions in the English Courts as well as British subjects (*l*). But alien enemies are disabled, so long as hostilities last (though no longer), from bringing or maintaining any action in an English Court (*m*), either in person or by agent (*n*). There is, however, an exception in the case of alien enemies resident in this country under the King's protection (*o*). Alien enemies are not under any personal incapacity of contracting with British subjects (*p*) : but it is illegal to

(*i*) See note (*b*), above, p. 898.

(*k*) All the King's natural-born subjects were enabled to trace their title by descent through their alien ancestors by stat. 11 & 12 Will. III. c. 6, explained by 25 Geo. II. c. 39.

(*l*) Co. Litt. 129b; Dyer, 2b; Bac. Abr. Aliens (D). Aliens could not maintain real or mixed actions: but now that they may hold lands, they are entitled to recover them.

(*m*) Co. Litt. 129b; *Le Bret v. Papillon*, 4 East, 502; *Flindt v. Waters*, 15 East, 260; above, p. 783; *Alcinous v. Nigreu*, 4 E. & B. 217; and see *Driefontein, &c. v. Janson*, 1901, 2 K. B. 419, affirmed, 1902, A. C. 484, where the objection was waived.

(*n*) *Brandon v. Nesbitt*, 6 T. R. 23. It appears that, where rights of action have accrued to aliens in time of peace and their remedies are suspended by the breaking out of war, any statute of limitations will continue to run against them during the war; for the cause of

action is not affected and the right is regarded in law as being liable to confiscation; see *A.-G. v. Wenden*, Parker, 267; *Flindt v. Waters*, 15 East, 260, 266; *Rhodes v. Smethurst*, 6 M. & W. 351; *De Wahl v. Branne*, 25 L. J. Ex. 343, 344, 345; above, p. 898, n. (*f*); Pollock on Contract, 96, 7th ed. In the United States, however, it has been decided that statutes of limitations do not run in such circumstances during the war: *Hanger v. Abbott*, 6 Wallace, 532; *Brown v. Hiatts*, 15 Wallace (82 U. S.), 177; L. Q. R. xx. 168.

(*o*) *Wells v. Williams*, 1 Ld. Raym. 282; *McConnell v. Hector*, 3 B. & P. 113, 114; *Janson v. Driefontein, &c.*, 1902, A. C. 484, 506; see Co. Litt. 129b, n. (3), and consider the pleading in *Alcinous v. Nigreu*, 4 E. & B. 217.

(*p*) See *Antoine v. Morshead*, 6 Taunt. 237; *Daubuz v. Morshead*, ib. 332; *De Wahl v. Branne*, 1 H. & N. 178; Pollock on Contract, 96, 7th ed.

Effect of war
on contracts
made with
aliens in time
of peace.

trade with the inhabitants of hostile states without the license of the Crown; and contracts made in violation of this rule are void (*q*). And it seems that a contract made with an inhabitant of a hostile state to buy or sell land in England would fall within this rule, which extends to prohibit all commercial intercourse between the King's subjects and his enemies (*r*). But if such a contract were made with a hostile alien residing in this country under the King's protection, it would appear to be valid and enforceable on either side (*s*). Where a contract is made in time of peace with an alien resident in his own country, and war breaks out between that country and this before the time fixed for performance of the agreement, the contract is dissolved if its performance involve commercial intercourse with the inhabitants of the hostile state (*t*), or would otherwise be detrimental to the public interests of this country (*u*). It appears, however, that, except in these conditions and provided that the nature of the agreement admit of its performance being delayed, the obligations arising from a contract so made with an alien are not discharged by the breaking out of war (*x*); though the alien's right to enforce the agreement is necessarily suspended by his incapacity to sue thereon during the continuance of hostilities (*y*). The application of these principles to contracts for the sale of land is not yet regulated by any judicial decision. It is thought, however, that if

(*q*) *The Hoop*, 1 C. Rob. 196; *Potts v. Bell*, 8 T. R. 548; *Esposito v. Bowden*, 7 E. & B. 763.

(*r*) See *McConnell v. Hector*, 3 B. & P. 113, 111; *Wallison v. Patterson*, 7 Taunt. 439; *Esposito v. Bowden*, 7 E. & B. 763, 779; *Janson v. Driefontein, &c.*, 1902, A. C. 484, 489, 502, 509; above, p. 857.

(*s*) See notes (*vi*) *p.*, above, p. 849.

(*t*) *Esposito v. Bowden*, 7 E. &

B. 763; *Janson v. Driefontein, &c.*, 1902, A. C. 484, 509; above, p. 867.

(*u*) *Furtado v. Rodgers*, 3 B. & P. 191; *Gamba v. Le Mesurier*, 4 East, 407; *Brandon v. Curling*, ib. 410; *Janson v. Driefontein, &c.*, 1902, A. C. 484, 493, 494, 499, 502, 506 sq.

(*x*) See cases cited in previous note; *Expte. Baussancker*, 13 Ves. 71.

(*y*) Above, p. 899.

such a contract were made in time of peace between an Englishman and an alien resident in his own country, and a day fixed for completion and time made of the essence of the contract (*z*), and before that day war broke out between England and the other country, the contract would be dissolved (*a*). If, however, time were not made of the essence of the contract, there would be ground for contending that the parties' rights thereunder were only suspended. A contract made with the inhabitant of a friendly state, which becomes a hostile state before the agreement is carried out, may be lawfully performed by the King's license or permission, as where by royal authority a certain time is allowed after the commencement of hostilities for the performance of contracts previously made with residents in the enemy's country (*b*). As we have seen (*c*), rights of action, which have arisen in favour of an alien from the *breach* in time of peace of a contract made by him with an English subject, are not destroyed if war break out between his country and England; they are merely suspended, subject, apparently, to the operation thereon of any statute of limitations (*d*).

Performance
by royal
license or
permission.

Every conveyancer must of course have a proper knowledge of the law concerning the relation of husband and wife in regard to property and contract. This is stated in other books, for which the writer is now responsible (*e*), and will not be fully repeated here. For our present purpose, the most important points are

Married
women.

z. Above, pp. 575—577.

a. It is thought that in such case the purchaser would have a lien on the land sold for repayment of his deposit, if any; see cases cited above, p. 866, n. (*x*).

b. *Rucker v. Ashby*, 5 M. & S. 25; *Clemontson v. Blessig*, 11 Ex. 135; see also, *Nigel, &c. v. Hoade*, 1901, 2 K. B. 849.

c. Above, p. 867.

d. Above, p. 899, n. *u*.

e. See Wms. Real Prop. 306 sq. (as to freeholds), 485, 488, 491, 494—496 (as to copyholds), 527, 528 (as to leaseholds), 21st ed.; Wms. Pers. Prop. 488 sq. (as to chattels personal and contracts), 16th ed.

Wife's
copyholds.

these:—By the common law, married women were enabled both to *purchase* (*f*) and to hold lands: but their estates in land were subject to the rights, which their husbands acquired therein (*g*); and they were incapable, as a rule, of alienating or affecting the same by their own act alone (*h*). They could only dispose of their freeholds by fine levied or recovery suffered with their husbands' concurrence, on which occasions they were examined apart to ascertain if their consent thereto were free (*i*). And a married woman could by a fine so levied by herself and her husband effectually assure, not only her legal but her equitable estates (*k*) in freehold lands, and also any interest which she might have in such lands either at law or in equity (*l*); for example, her interest in the proceeds of sale of lands settled on trust for sale (*m*). A wife's legal estates or interests in copyholds were alienable in like manner by surrender in which her husband must concur, she herself being separately examined as to her consent (*n*). But it was doubtful in what manner her equitable estates or interests in copyholds were alienable (*o*); for the disposition of copyholds by surrender is properly

(*f*) Co. Litt. 3a, 356b. But a wife's *purchase* of land was voidable either by her husband, who might effectually disagree thereto, or by herself after the determination of the coverture, and notwithstanding that her husband had agreed thereto; or by her heirs, if she died without having agreed thereto when free from coverture; Co. Litt. ubi sup.; 2 Black. Comm. 292, 293; 3 Prest. Abst. 104, 107; cf. above, p. 870.

(*g*) See note (*e*), above, p. 901.

(*h*) 1 Black. Comm. 442—444; Wms. Real Prop. 307, 309—311, 21st ed.

(*i*) Cruise on Fines and Recoveries, i. 107 *sq.*, 199 *sq.*, ii. 179, 3rd ed.; 1 Prest. Abst. 333, 2nd

ed.; Wms. Real Prop. 310, 311, 21st ed.

(*k*) *Goodrick v. Brown*, 1 Ch. Ca. 49; *Washbourn v. Downes*, ib. 213; *Clifford v. Asbley*, ib. 268; *Penne v. Peacock*, Ca. t. Talb. 41, 43; 1 *Rop. Husb. & Wife*, 140, 2nd ed.

(*l*) *Goodrick v. Shotbolt*, Prec. Ch. 333; *May v. Roper*, 4 Sim. 360; *Forbes v. Adams*, 9 Sim. 462; 1 Prest. Abst. 333, 2nd ed.; see also *Fick v. Edwards*, 3 P. W. 372; *Helps v. Hereford*, 2 B. & A. 212.

(*m*) *May v. Roper*, ubi sup.

(*n*) 1 Wat. Cop. 63; 1 Prest. Abst. 333, 2nd ed.; Wms. Real Prop. 485, 21st ed.

(*o*) Williams on Seisin, 128.

applicable only to legal interests therein (*p*), and it was a question whether a fine levied by husband and wife would be a valid assurance of her equitable estate in copyhold land (*q*). The husband alone might dispose of his wife's leaseholds for years by act *inter vivos*, though not by will (*r*). It was established that a married woman might well exercise any power, whether appendant, in gross or collateral, and whether in respect of real or of personal estate, by herself alone as effectually as if she were a *feme sole*; unless she were restrained by the terms of the instrument creating the power from exercising it during her coverture. And this is the case whether the power were conferred upon her during her coverture or whilst she was single (*s*).

Wife's
leaseholds.

Execution of
powers by
married
women.

Fines were abolished by the Fines and Recoveries Act, 1833 (*t*). This Act enabled (*u*) every married woman after that year, by deed executed with the concurrence of her husband and duly acknowledged by her as therein provided (*x*), to dispose of lands of any

Fines and
Recoveries
Act, 1833.

(*p*) 1 Scriv. Cop. 262, 3rd ed. An exception was admitted in the case of an equitable estate tail in copyholds which might be barred by a surrender, in cases where a legal estate tail might be so barred; *Radford v. Wilson*, 3 Atk. 815; 1 Scriv. Cop. 77; 1 Wat. Cop. 239, 4th ed.

(*q*) See 1 Prest. Conv. 160; 1 Scriv. Cop. 87, 3rd ed.; Wat. Cop. i. 64, n., 181, n., ii. 42, n., 4th ed.

(*r*) Co. Litt. 46b, 351a; 1 Rop. Husb. & Wife, 173, 177, 2nd ed.; Wms. Real Prop. 527, 21st ed.

(*s*) Sug. Pow. 153—168, 8th ed.; *Doe d. Blomfield v. Eyre*, 3 C. B. 557, 578, 5 C. B. 713, 741, 748; *Wood v. Wood*, L. R. 10 Eq. 220; Wms. Real Prop. 302, 13th ed.; 388, 21st ed.

(*t*) Stat. 3 & 4 Will. IV. c. 74, s. 2.

(*u*) Sect. 77. Disentailing assurances by married women being tenants in tail were excepted from this section, but were authorised by sect. 40, requiring the concurrence of the husband and acknowledgment of the deed by the wife to give effect thereto. Such acknowledgment might well be made after the enrolment of the disentailing deed and more than six months after its execution; *Ex parte Taverner*, 20 Beav. 490, 7 De G. M. & G. 627.

(*x*) Before the year 1883, the acknowledgment was required to be made before a judge of the superior Courts at Westminster, or of any County Court, or a Master in Chancery or two commissioners; and a certificate of the taking of the acknowledgment was required to be duly signed and filed, or else it would

Wife's
copyholds.

tenure, and money subject to be invested in the purchase of lands (*y*), and also to dispose of, release, surrender or extinguish any estate (*z*) which she alone, or she and her husband in her right, might have in any lands (*y*) of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which might be vested in or limited or reserved to her in regard to any lands (*y*) of any tenure, or any such money as aforesaid, or in regard to any estate (*z*) in any lands (*y*) of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole*. From the disposing power so conferred, a married woman's *legal* estates or interests alienable by surrender in copyhold lands (*a*) were alone excepted (*b*). The Act therefore enabled every married woman to dispose by deed executed with her husband's concurrence and duly acknowledged by her of any legal or equitable estate or interest to which she was entitled in freehold hereditaments and any *equitable* estate or interest to which she was entitled in copyhold hereditaments (*c*). And it has been held that a wife may by such a deed make a binding disposition by way of declaration of trust of the equitable estate in any copyholds, of which she is the legal tenant on the court rolls subject to the old law (*d*). A wife's power to

have been of no effect. But deeds executed by married women after the year 1882 may be acknowledged before one commissioner only; and a certificate of the acknowledgment of such deeds is not required. This distinction must be borne in mind in investigating title. See above, pp. 145, 160; stats. 3 & 4 Will. IV. c. 74, s. 79; 51 & 52 Vict. c. 43, s. 184, replacing 19 & 20 Vict. c. 108, s. 73; 45 & 46 Vict. c. 39, s. 7; *Jolly v. Hancock*, 7 Ex. 820.

(*y*) Including hereditaments of any tenure, whether corporeal or incorporeal, and any undivided

share thereof: stat. 3 & 4 Will. IV. c. 74, s. 1.

(*z*) Including any interest, charge, lien, or incumbrance in, upon, or affecting any hereditaments, or any money subject to be invested in the purchase of hereditaments, either at law or in equity; *ibid*.

(*a*) Above, p. 902.

(*b*) Stat. 3 & 4 Will. IV. c. 74, s. 77.

(*c*) Williams on Seisin, 128; Wms. Real Prop. 491, 21st ed.

(*d*) *Carter v. Carter*, 1896, 1 Ch. 62.

dispose of her legal interests in copyholds by surrender, in which her husband joined and on which she was separately examined (*e*), remained unaffected by the Act. And the Act further introduced an alternative method of alienation by married women of their equitable interests in copyholds (*f*); providing that such interests might also be disposed of by surrender, in which the husband should concur, and on which the wife should be separately examined (*g*). It was held that under the Fines and Recoveries Act a married woman could effectually dispose of her interest in the proceeds of sale of lands held on trust for sale (*h*); of the charge created in her favour by a mortgage made to her when single by deposit of the title deeds of land (*i*); of her interest under a settlement of personalty in land improperly purchased therewith (*k*); and even of her equitable reversionary life interest in a sum of money invested pursuant to the trusts of the settlement, under which she was entitled, on a mortgage of land (*l*). The Fines and Recoveries Act did not interfere in any way with the husband's power of alienating his wife's leaseholds by his own act *inter viros* alone (*m*).

Under the Fines and Recoveries Act (*n*), if a husband shall, in consequence of being a lunatic, idiot or of

Order dispensing with the husband's concurrence in case of his lunacy, &c.

e Above, p. 902.

f Williams on Seisin, 128; Wms. Real Prop. 491, 492, 21st ed.

g Stat. 3 & 4 Will. IV. c. 74, s. 90, also enacting that all such surrenders theretofore made should be valid: see above, p. 903.

h Briggs v. Chamberlain, 11 Hare, 69; Tuer v. Turner, 20 Beav. 560; Re Jakeman's Trusts, 23 Ch. D. 344. If, however, the lands so held had been actually sold, the wife no longer had an interest in land within the meaning of the Act, and could not

avail herself of the disposing power thereby conferred: *Re Algee*, 1. R. 2 Eq. 485; *Miller v. Collins*, 1896, 1 Ch. 573, 577, 578.

i *Williams v. Cook*, 4 Giff. 343.

k *Re Durrant and Stoner*, 18 Ch. D. 106; see above, p. 287.

l *Miller v. Collins*, 1896, 1 Ch. 573, diss. Kay, L. J., overruling *Re Newton's Trusts*, 23 Ch. D. 181.

m Above, p. 903.

n Stat. 3 & 4 Will. IV. c. 74, s. 91.

unsound mind, whether so found by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of copyholds, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife (*o*), either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, an order may be obtained, on the wife's application formerly to the Court of Common Pleas and now to the King's Bench Division (*p*) of the High Court, dispensing with the husband's concurrence in any case in which his concurrence is required by that Act or otherwise; and all acts, deeds or surrenders to be done, executed, or made by the wife, in pursuance of such order, in regard to lands (*q*) of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of the Act) be as good and valid as they would have been if the husband had concurred. It appears that, as a rule, such an order will only be made to give effect to some particular sale or other transaction agreed upon (*r*). Where a married woman has obtained an order of this kind, there is no necessity for her to acknowledge the deed as above provided (*s*): but her conveyance in pursuance of such order will not operate to assure her husband's interest in the lands during the continuance of the coverture, or, it seems, his estate by the curtesy; it will only pass her own interest therein (*t*).

(*o*) See *Expte. Robinson*, L. R. 4 C. P. 205; *Re Crane*, 10 Q. B. D. 284.

(*p*) *Re Giles*, 1894, W. N. 73, 70 L. T. 757.

(*q*) See above, p. 904, n. 2.

(*r*) *Re Graham*, 19 C. B. N. S.

370; see *Re Hart*, 1882, W. N. 36; above, n. (*p*).

(*s*) *Goodchild v. Dougal*, 3 Ch. D. 650.

(*t*) *Förcke v. Draycott*, 29 Ch. D. 996.

By the Real Property Act, 1845 (*u*), a married woman was enabled by deed executed with her husband's concurrence and acknowledged by her as aforesaid to dispose of a contingent, an executory and a future interest, and a possibility coupled with an interest (*x*) in any hereditaments, and of a right of entry (*y*), and to disclaim any estate or interest in any hereditaments.

Disclaimer
by married
woman.

What is written above (*z*) concerning the alienation of married women's equitable estates or interests in land applies only to property not settled for their separate use (*a*). If any estate or interest in land were settled on trust for the separate use of a married woman, she could dispose of her equitable interest in such property as effectually as if she were a single woman, both by act *inter vivos* and by will (*b*), and not only by conveyance or contract dealing specifically therewith, but also in consequence of her general engagements entered into with respect to the same (*c*). Where any land so settled was not vested in trustees but was limited to the wife directly for her separate use, her husband would take such estate or interest therein as the common law allowed him, but in equity he would be a trustee thereof for his wife's benefit; and in such case, although the wife alone could dispose of her equitable interest in the property, the legal estate therein could only be effectually assured by deed executed with the husband's concurrence and duly acknowledged by her, or by other means appropriate at law to the nature of the estate

Wife's
separate
estate.

(*u*) Stat. 8 & 9 Vict. c. 106, ss. 6, 7; see above, p. 902, n. (*f*).

(*v*) See Wms. Real Prop. 367, 368, 402, 21st ed.

(*y*) See above, pp. 401, 405, 859, n. (*s*).

(*z*) Pp. 901 *sq.*

a See *Taylor v. Meadows*, 4 De

G. J. & S. 597, 604, 605; Wms. Real Prop. 313, 21st ed.

(*b*) *Taylor v. Meadows*, 4 De G. J. & S. 597; see *Waddock v. Noble*, L. R. 7 H. L. 580; Wms. Real Prop. 313 *sq.*, 21st ed.

(*c*) *Johanson v. Gallagher*, 3 De G. F. & J. 494; *Pike v. Fitzgibbon*, 17 Ch. D. 454.

Restraint on alienation.

Wife's equitable estate tail being her separate estate.

Removal of a restraint on anticipation.

settled (*d*). If, however, property were settled on trust for the separate use of a married woman, with a proviso that she should have no power to anticipate the income thereof, she was incapable of alienating her interest therein except by will, so long as she was under any coverture (*e*); and it could not be affected by her general engagements (*f*). If a married woman were entitled to an equitable estate tail in any lands as her separate estate, and desired to bar the entail, it was required by the Fines and Recoveries Act (*g*) that her husband should concur in the disentailing deed and that she should duly acknowledge the same. If she were so entitled subject to a restraint on anticipation, that did not prevent her from so barring the entail. It appears, however, that the restraint was not thereby defeated, but continued to affect the estate in fee simple, into which her estate tail was enlarged (*h*). Formerly, the Court had no power to interfere by its order with the effect of a restraint upon alienation attached to any property settled for the separate use of a married woman, however beneficial to her such an interference might have been (*i*). But by the Conveyancing Act of 1881 (*k*), notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property (*l*).

(*d*) *Hall v. Waterhouse*, 5 Giff. 64; see above, pp. 901 sq.

(*e*) *Talbot v. Armstrong*, 1 Beav. 1, 4 My. & Cr. 390; *Baggett v. Meux*, 1 Ph. 627; *Cooper v. Macdonald*, 7 Ch. D. 288; *Bateman v. Faber*, 1898, 1 Ch. 144; see Wms. Real Prop. 315, 316, 21st ed.; Wms. Pers. Prop. 501, 502, 16th ed.

(*f*) *Fisher v. Fergusson*, 17 Ch. D. 151.

(*g*) Stat. 3 & 4 Will. IV. c. 74, s. 40; above, p. 903, n. (*u*).

(*h*) *Cooper v. Macdonald*, 7 Ch. D. 288.

(*i*) *Robinson v. Wheelerwright*, 21 Beav. 214, 6 De G. M. & G. 535.

(*k*) Stat. 44 & 45 Vict. c. 41, s. 39.

(*l*) The Court is exceedingly chary of exercising the jurisdiction so conferred; *Re Little*,

Originally, a trust of lands for the separate use of a married woman could only arise by act of parties; as by ante-nuptial contract between husband and wife, or by the express provision of those by whom the property was bestowed (*m*). The Married Women's Property Act, 1870 (*n*), provided that, subject and without prejudice to the trusts of any settlement affecting the same, the following property acquired during her marriage by any woman married after the passing of that Act should belong to her for her separate use; namely, any personal property (*o*) to which she might become entitled as next of kin or one of the next of kin of an intestate (*p*), and the rents and profits of any freehold, copyhold or customaryhold property which should descend upon her as heiress or co-heiress of an intestate (*q*). This Act did not confer upon married women, or enable them to dispose of, any separate legal estate in the property so secured to them, but only gave them the same equitable interest as they would have enjoyed under an express trust for their separate use, together with the power of alienation incident in equity thereto (*r*).

By the Divorce Acts of 1857 and 1858 (*s*), in every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to (1) property of every description which she may acquire

Married
Women's
Property Act,
1870.

Judicial
separation.

40 Ch. D. 418; *Re Pollard's Settlement*, 1896, 1 Ch. 901, 2 Ch. 552; *Re Blundell*, 1901, 2 Ch. 221.

(*m*) Wms. Real Prop. 316, 21st ed.

(*n*) Stat. 33 & 34 Vict. c. 93, passed 9th Aug. 1870.

(*o*) Including, of course, chattels real.

(*p*) Sect. 7.

(*q*) Sect. 8, which only gives

the rents and profits, and not the fee simple, of such property for her separate use; *Johanson v. Johanson*, 35 Ch. D. 315.

(*r*) *Howard v. Bank of England*, L. R. 19 Eq. 295, 300, 301; *Johanson v. Johanson*, 35 Ch. D. 345, 349; Wms. Conv. Stat. 377-382.

(*s*) Stats. 20 & 21 Vict. c. 85, s. 25; 21 & 22 Vict. c. 108, ss. 7, 8.

or which may come to or devolve upon her (*t*), (2) property to which she has become or shall become entitled as executrix, administratrix or trustee since the sentence of separation, and (3) property of or to which she is possessed or entitled for an estate in remainder or reversion (*u*) at the date of the decree; and all such property may be disposed of by her in all respects as a *feme sole*, and shall, if she shall die intestate, go as the same would have gone had her husband been then dead; provided that if she shall again cohabit with her husband, all such property as she may then be entitled to shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate. Under these enactments, the wife can during the separation dispose as a *feme sole* (without the necessity of her husband's concurrence or of acknowledgment) of all estates or interests in land, to which she may become entitled after the date of the decree (*x*), notwithstanding that the same were given to her without power of anticipation (*y*), and also of all estates in remainder or reversion (*z*), to which she is entitled at the time of the decree, whether the same have fallen into possession or not (*a*). But the Acts give her no power to dispose of any estates or interests to which she is entitled in possession, and not in reversion nor in action (*b*), at the time of the decree; so that if at that time she were entitled in possession to lands settled for her separate use without power of anticipa-

t It has been held that under these words the wife has the right to receive or recover any chose in action, to which she was entitled but which had not been reduced into possession at the time of the decree; *Johnson v. Lander*, L. R. 7 Eq. 228; *Re Coward and Adam's Purchase*, L. R. 20 Eq. 179; *Nicholson v. Penny, &c., Co.*, 7 Ch. D. 48.

u These words appear to in-

clude a reversion expectant on a lease for years; see Wms. Real Prop. 333, 334, 21st ed.

(x) *Re Hughes*, 1898, 1 Ch. 529.

(y) *Cooke v. Fuller*, 26 Beav. 99; *Munt v. Glynes*, 20 W. R. 823; *Waite v. Morland*, 38 Ch. D. 135, 138.

(z) See note (*n*), above.

(a) See *Re Insale*, L. R. 1 Eq. 470, 473.

(b) See note (*t*), above.

tion, the Acts do not remove the restraint, and she can no more alien the lands during the separation than she could whilst living with her husband (*c*). Under the same Acts (*d*), where a wife deserted by her husband has obtained a protection order, she is during the continuance of the order and as from the date of the desertion (*e*), in the like position in all respects with regard to property as if she had obtained a decree of judicial separation. By the Summary Jurisdiction (Married Women) Act, 1895 (*f*), a separation order made thereunder shall while in force have the effect in all respects of a decree for judicial separation on the ground of cruelty.

Protection
order.

Separation
order.

When an absolute decree has been made under the Divorce Acts (*g*) for the dissolution of a marriage, all the rights which the former husband and wife previously enjoyed in respect of each other's property, independently of the provisions of any settlement, are immediately extinguished (*h*). Thus if the divorced persons were entitled to lands at common law as tenants by entireties (*i*), they become joint tenants, having the

Effect of
divorce.

(*c*) *Waite v. Morland*, 38 Ch. D. 135; *Hill v. Cooper*, 1893, 2 Q. B. 85.

(*d*) Stats. 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, ss. 8, 9.

(*e*) *Bath v. Bank of England*, 1 K. & J. 564, 568; *Re Kingsley's Trusts*, 26 Beav. 84; *Cooke v. Fuller*, ib. 99; *Re Elliott*, L. R. 2 P. & M. 274; *Waite v. Morland*, 38 Ch. D. 135, 138.

(*f*) Stat. 58 & 59 Vict. c. 39, ss. 4, 5, extended by 2 Edw. VII. c. 28, s. 5 (1).

(*g*) Stats. 20 & 21 Vict. c. 85, ss. 27—31, 57; 23 & 24 Vict. c. 144, s. 7; 25 & 26 Vict. c. 81; 29 & 30 Vict. c. 32, s. 3. In the interval between the making of a decree *visi* and a decree absolute for the dissolution of a marriage, the wife remains a married

woman; *Norman v. Villars*, 2 Ex. D. 359; but the husband is not entitled to exercise his marital rights in respect of her property to her prejudice; *Prole v. Saddy*, L. R. 3 Ch. 220; *Alford v. Walker*, 1896, 2 Ch. 369, 384; and when the decree absolute has been pronounced, the marriage is dissolved as from the date of the decree *visi*; *Tremayne v. Rushleigh*, 1908, 1 Ch. 681, 694.

(*h*) *Wells v. Mallon*, 31 Beav. 48; *Watkinson v. Gibson*, L. R. 4 Eq. 162; *Prole v. Saddy*, L. R. 3 Ch. 220; *Codrington v. Codrington*, L. R. 7 H. L. 854; *Thorndyke v. Thorndyke*, 1893, 2 Ch. 229; *Re Crawford's Settlement*, 1905, 1 Ch. 11.

(*i*) See Wms. Real Prop. 312, 21st ed.

same respective interests as if they were strangers, upon the dissolution of the marriage (*k*). So if the divorced wife were entitled at common law to an estate in fee simple in freeholds, all the husband's previously existing estate or interest therein, whether during the joint lives only or as tenant by the curtesy potential or initiate, would be at an end; and she could thenceforth enjoy and convey the same as a single woman without his interference or concurrence (*l*). The husband would be equally deprived of all interest in the wife's copyholds (*l*). And if the wife were entitled at common law to a term of years, the husband's interest therein would be as effectually extinguished as if he had died in her lifetime without making any disposition thereof (*l*). The husband also loses by divorce all his right to succeed to his wife's chattels upon her death and intestacy (*m*). And the wife loses her right to succeed on the husband's death and intestacy to a part of his chattels (*n*). But divorce only extinguishes the rights which were given to the parties in each other's property by the rules of common law or equity in virtue of their relation of husband and wife. And it is now established that a decree for the dissolution of a marriage does not deprive either party of any interest in any property which is limited by any settlement to him or her by name (*o*). If, however, the wife were so entitled under any settlement, but without power of anticipation, the restraint on anticipation would cease to be operative after the

(*k*) *Thorndley v. Thorndley*, 1893, 2 Ch. 229.

(*l*) This follows from the principle laid down in the cases cited in note (*h*), above, p. 911.

(*m*) *Wilkinson v. Gibson*, L. R. 4 Eq. 162; *Re Wallis*, 1905, P. 326.

(*n*) *Re Nares*, 13 P. D. 35.

(*o*) *Fitzgerald v. Chapman*, 1 Ch. D. 563; *Barton v. Sturgeon*, 2 Ch. D. 318. The Court has

power, after a decree of nullity or dissolution of marriage, to make an order varying the provisions of any ante-nuptial or post-nuptial settlement which has been made on the parties, for the benefit either of the children of the marriage or of their parents; see stats. 22 & 23 Vict. c. 61, s. 5; 41 Vict. c. 19, s. 3; Wms. Pers. Prop. 535, 16th ed.

divorce; as the wife is thereby made single. But of course the restraint would revive, if it were not limited to the particular coverture dissolved, and the woman were to marry again without having disposed of the property in the interval (*p*). It appears that upon divorce either party loses any interest in property which was limited to him or her, not by name, but under the description of the husband or wife of the other; for he or she then ceases to answer that description (*q*). The effect of a decree of nullity of marriage on the ground of the canonical disability of impotence is to render the marriage void, and appears to resemble the effect of a divorce as regards the extinguishment of the parties' common law rights in each other's property (*r*); for the marriage was voidable only, and was binding on the parties until they were released by the decree (*s*). And property conveyed by either spouse to the other during the continuance of the marriage as a gift or advancement cannot be recovered back on the pronouncement of such a decree (*t*). But the consequences of such a decree differ from those of a divorce with respect to interests limited by any settlement made in consideration of the marriage to take effect in the parties' favour after the solemnization thereof; as these interests are avoided upon the pronouncement of the decree, no valid marriage having taken place (*u*). When a marriage is void for some

Nullity of marriage, effect of decree of.

(*p*) See cases cited above, p. 908, n. (*e*). The Court has jurisdiction, on making an order for the variation of a settlement after a decree for dissolution, to remove a restraint on anticipation; *Churchward v. Churchward*, 1910, P. 195.

(*q*) *Re Morrison*, 40 Ch. D. 30, Kay, J., declining to follow *Bullmore v. Winter*, 22 Ch. D. 619, Fry, J.

(*r*) Above, p. 911; and see note (*o*), p. 912, above.

(*s*) See 1 Black. Comm. Ch. 15; 3 Black. Comm. 92—94; Burn's Eccl. Law, ii. 500, 9th ed.; stat. 20 & 21 Vict. c. 85, ss. 6, 22; *Cavell v. Prince*, 35 L. J. Ex. 162; *A. v. B.*, L. R. 1 P. & M. 559; *Dunbar v. Dunbar*, 1909, 2 Ch. 639, 644.

(*t*) *Dunbar v. Dunbar*, ubi sup.

(*u*) *Dormer v. Ward*, 1901, P. 20. The Court has nevertheless power to vary the settlements; *S. C.*; see above, n. (*o*), p. 912.

legal disability, that is, any impediment raised by common law or statute to the formation of a valid marriage (*x*)—such as the existence of a previous marriage (*y*) or of such relationship between the parties as brings them within the prohibited degrees of consanguinity or affinity (*z*)—the marriage is altogether void *ab initio*, and the parties have never occupied the position of husband and wife or acquired the rights resulting therefrom (*a*). So that a decree of nullity on the ground of some *legal* disability has no effect in dissolving the marriage tie; it is not necessary to establish, but is merely declaratory of the invalidity of the marriage (*b*).

Married
woman bare
trustee.

Since the Vendor and Purchaser Act, 1874 (*c*), now replaced in this respect by the Trustee Act, 1893 (*d*), when any freehold or copyhold hereditament is vested in a married woman as a bare trustee (*e*) she may convey or surrender it as if she were a *feme sole*.

Married
Women's
Property
Act, 1882.

By the Married Women's Property Act, 1882 (*f*), which came into operation on the 1st of January, 1883 (*g*), a married woman is capable of acquiring, holding and disposing, by will or otherwise, of any real or personal property, in the same manner as if she

(*x*) 1 Black. Comm. 435 *sq.*

(*y*) *Birt v. Boutinez*, L. R. 1 P. & M. 487.

(*z*) This was made a legal disability by stat. 5 & 6 Will. IV. c. 54, s. 2; see 1 Black. Comm. 434; *R. v. Chadwick*, 11 Q. B. 173; *Brook v. Brook*, 9 H. L. C. 193.

(*a*) See *Expte. Naden*, L. R. 9 Ch. 670; *Dunbar v. Dunbar*, 1909, 2 Ch. 639, 644. The former case and those cited in the previous note relate to pretended marriage with a deceased wife's sister before stat. 7 Edw. VII. c. 47. As to settlements executed in con-

sideration of such marriages, see *Pawson v. Brown*, 13 Ch. D. 202; *Phillips v. Probyn*, 1899, 1 Ch. 811; stat. 7 Edw. VII. c. 47, s. 2; cf. *Ayerst v. Jenkins*, L. R. 16 Eq. 275.

(*b*) *Birt v. Boutinez*, L. R. 1 P. & M. 487.

(*c*) Stat. 37 & 38 Vict. c. 78, s. 6, passed 7th Aug. 1874.

(*d*) Stat. 56 & 57 Vict. c. 53, s. 16.

(*e*) See above, p. 220, n. (*z*), as to the meaning of this term.

(*f*) Stat. 45 & 46 Vict. c. 75, s. 1, sub-s. 1.

(*g*) Sect. 25.

were a *feme sole*, without the intervention of any trustee. Every woman married after the commencement of the Act is entitled to hold and dispose of, as her separate property, all real and personal property which belonged to her at the time of marriage, or shall be acquired by or devolve upon her after marriage (*h*). And every woman married before the commencement of the Act is entitled to hold and dispose of, as her separate property, all real and personal property, to which her title, whether vested or contingent and whether in possession, reversion or remainder, has accrued after the commencement of the Act (*i*). But the Act is not to interfere with any settlement made or to be made respecting the property of any married woman, or to interfere with or render inoperative any restriction against anticipation attached or to be attached to the enjoyment by a married woman of any property or income (*k*).

Under this Act, it has been decided, with respect to women married before the year 1883, that where they were before that year entitled to any property, either contingently or in reversion or remainder, it does not become their separate property by reason of their interests vesting or falling into possession after the commencement of the Act (*l*). As regards such property and any property to which they were entitled in possession before that year, they remain subject to the law in force before the Act. But any property given since the commencement of the Act to any married woman beneficially, and not as a trustee or an executrix (*m*), belongs to her as her separate property, although not expressly limited for her separate use (*n*). It was,

Construction
of the
Married
Women's
Property
Act, 1882.

(*h*) Sect. 2.

(*i*) Sect. 5.

(*k*) Sect. 19.

(*l*) *Reid v. Reid*, 31 Ch. D. 402, overruling *Baynton v. Collins*, 27 Ch. D. 604, and *Re Thompson and Carson*, 29 Ch. D. 177; *Re*

Bacon, 1907, 1 Ch. 475.

(*m*) *Re Hackness and Allsopp's Contract*, 1896, 2 Ch. 358.

(*n*) *Re Luntley*, 1896, 2 Ch. 690; see also *Re Davenport*, 1895, 1 Ch. 361.

however, held, upon the construction of the proviso that the Act shall not interfere with or affect any settlement made or to be made respecting the property of any married woman (*o*), that a covenant by a husband alone contained in a settlement made before the Act to settle his wife's after-acquired property would bind property to which she might become entitled after the Act, to the same extent as such property would have been bound by the husband's covenant at common law, unless the property were expressly given for her separate use (*p*). And it appears that the same construction may be placed upon a similar covenant contained in a settlement made since the Act but before the year 1908; for it was further decided that an antenuptial settlement made after the Act by an intended husband and infant wife of her personal property had the same effect as it would have had at common law, and was therefore completely binding on the wife as regards any interest therein of which the husband could by virtue of his marital rights at common law have made a valid disposition (*q*). It is, however, now provided by the Married Women's Property Act, 1907 (*r*), that notwithstanding sect. 19 of the Act of 1882 (*s*), a settlement or agreement for a settlement made after the year 1907 (*t*) by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid

Amending
Act of 1907.

o, Stat. 15 & 46 Vict. c. 75, s. 19.

p, *Re Stanger's Trusts*, 24 Ch. D. 195; *Re Whitaker*, 34 Ch. D. 227; *Hancock v. Hancock*, 38 Ch. D. 78; see Wms. Pers. Prop. 393, 514, 16th ed.

q *Stevens v. Trevor-Garrick*, 1893, 2 Ch. 307; *Buckland v. Buckland*, 1900, 2 Ch. 534; see Wms. Pers. Prop. 393, 514, 16th ed.

r Stat. 7 Edw. VII. c. 18, s. 2, sub-ss. 1, 2. By sub-s. 3, nothing in this section shall render invalid any settlement or agreement for a settlement made or to be made under the provisions of the Infant Settlements Act, 1855; see above, p. 876.

s Above, pp. 915, 916.

t Stat. 7 Edw. VII. c. 18, s. 4.

unless it is executed by her if she is of full age, or confirmed by her after she attains full age; but if she dies an infant any covenant or disposition by her husband contained in the settlement or agreement shall bind or pass any interest in any property of hers to which he may become entitled on her death and which he could have bound or disposed of if this Act had not been passed (*u*).

Where under the Act of 1882 a married woman becomes entitled to any estate or interest in any lands or hereditaments as her separate property, she takes the whole legal or other estate or interest limited to her in the same manner as if she were a single woman; and her husband does not acquire the rights and interest therein during his wife's lifetime which he would have had if she had been entitled independently of the Act, either at common law or in equity but not for her separate use (*v*). But he may succeed after her death, if she die intestate, to her freehold or copyhold estate in fee simple as tenant by the curtesy (*x*), and to her leaseholds for years in virtue of his marital right to take the same by survivorship (*y*). The wife can dispose of any estate or interest, to which she so becomes entitled as her separate property, in the same manner as if she were single, without the necessity of her husband's concurrence in or her own acknowledgment of the deed of conveyance or of any other formality not required

Wife's estate
in her separate
property.

Wife's dis-
positions
thereof.

(*u*) See p. 916, n. (*v*).

(*v*) See *Hope v. Hope*, 1892, 2 Ch. 336, 341; *Thornley v. Thornley*, 1893, 2 Ch. 229; *Re Lumley*, 1896, 2 Ch. 690; Wms. Conv. Stat. 382, 383, 418, 419, 421.

(*x*) *Hope v. Hope*, 1892, 2 Ch. 336; see² above, p. 215; Wms. Real Prop. 307, 308, 316, 21st ed.

(*y*) After the coverture has come to an end, the quality of

separate property also ceases, and the husband can assert his common law right to have his wife's term by survivorship without the necessity of taking out administration to her: see Co. Litt. 46b, 300a, 351a; 2 Black. Comm. 433-435; *Re Lambert's Estate*, 39 Ch. D. 626; *Swman v. Wharton*, 1891, 1 Q. B. 491; *Hope v. Hope*, *ubi sup*.

Restraint on alienation.

Sale without notice of a restraint on anticipation.

The Act confers on married women a special, not a general, capacity to hold and dispose of property. Effect of wives' wills made during coverture.

in the case of an assurance by a single woman (*z*). Although if any such property be given to a married woman with a restraint on anticipation, she is under the like incapacity to deprive herself of the benefit thereof by any disposition, which she may purport to make, as attached with respect to her dealing with her equitable separate estate subject to a similar restraint (*a*). It appears, however, that where a wife enjoys a *legal* estate or interest by virtue of the Act of 1882 in any separate property, subject to a restraint on anticipation, and disposes of the property to a purchaser taking for value in good faith and without notice of the restraint, the purchaser will obtain a good title to the property; for the restraint on alienation is an incumbrance affecting the property in equity only and not at law (*b*). It is held that the Act of 1882 confers upon married women a special capacity only to hold and dispose of property, which is by virtue of the Act made their separate property, and does not invest them with the same general capacity in respect of all property as is enjoyed by single women. Thus it was decided that a will made by a woman during coverture and not re-executed by her when she became a widow was not effectual by virtue of the Act to pass property acquired by her after her husband's death (*c*). And the consequences of this ruling were only removed by the Married Women's Property Act, 1893 (*d*), which pro-

(*z*) *Re Drummond and Davie's Contract*, 1891, 1 Ch. 524, deciding that a wife can now bar the entail in any lands to which she is entitled for an estate tail as her separate property, without her husband's concurrence in or her own acknowledgment of the disentailing deed; cf. above, pp. 903, n. (*v*), 908.

(*a*) *Bates v. Kesterton*, 1896, 1 Ch. 159; *Re Lumley*, 1896, 2 Ch. 630; above, p. 908.

(*b*) See above, pp. 211, 212, 254, 491, 565.

(*c*) *Re Price*, 28 Ch. D. 709; *Re Chow*, 43 Ch. D. 12; following the law laid down in *Wilcock v. Noble*, L. R. 7 H. L. 580, with respect to dispositions by will of a married woman's equitable separate estate; and see *Re Bowen*, 1892, 2 Ch. 291.

(*d*) Stat. 56 & 57 Vict. c. 63, s. 3, passed 5th Dec. 1893; *Re James*, 1910, 1 Ch. 157.

vided in effect that the will made during coverture of a woman who might die after the passing of that Act (*e*) should take effect as if it had been executed immediately before her death, whether she had or had not any separate property at the time of making it, and need not be re-executed or re-published after her husband's death. So it has been considered that the Act did not repeal the rule that husband and wife are one person in law (*f*), but left it to take effect, where not modified or interfered with; whence it follows that on a gift of land or other property made since the Act to a husband and his wife and others in joint tenancy or tenancy in common, the husband and wife still become entitled to the share of one person only between them (*g*). And it has been further held that this Act only enables a married woman to hold and dispose of, as her separate property, estates and interests to which she is entitled for her own use beneficially, and not those to which she is entitled upon any trust (*h*). The consequence of this decision was that, where since the Act (*i*) any hereditaments were limited to a wife upon any trust or had devolved upon her as executrix or administratrix (*k*), she

Rule, that husband and wife are one person not repealed.

Property given to a wife on trust.

(*e*) *Re Wylie*, 1895, 2 Ch. 116, deciding that the Act applies to wills made before its passing.

(*f*) See *Wms. Real Prop.* 306, 311, 21st ed.

(*g*) *Re March*, 27 Ch. D. 166; *Re Jupp*, 39 Ch. D. 148, 152. The husband and wife take the share so given to them, as they take any other property given to them since the Act without words of severance, as joint tenants and not, in the case of freeholds or copyholds, by entireties; *Re March*, *ubi sup.*; *Thornley v. Thornley*, 1893, 2 Ch. 229; see *Wms. Real Prop.* 311, 312, 320, 21st ed.

(*h*) *Re Harkness and Alsopp's Contract*, 1896, 2 Ch. 358.

(*i*) The disposition of any here-

ditaments, which were limited to or devolved upon a married woman in trust before the year 1883, is of course governed by the old law existing independently of that Act; see above, p. 915.

(*k*) By the Married Women's Property Act, 1882, stat. 45 & 46 Vict. c. 75, ss. 1 (2), 18, 24, a married woman was enabled to accept any trust or the office of executrix or administratrix without her husband's consent, and was empowered to transfer as if she were a *feme sole* any stock, shares or debentures, to which she was entitled as trustee, executrix or administratrix. But she was not thereby expressly authorised so to dispose of any other trust property. At common law marriage

Married
woman
mortgagee.

Wife trustee-
mortgagee.

could not dispose of the same pursuant to the trust by her own act alone, unless the hereditaments were freehold or copyhold and she were a bare trustee thereof (*l*): but her husband took the estate or interest therein bestowed on him by the rules of law or equity apart from the Act, and had to join accordingly in alienating the same by the appropriate method of conveyance. That is to say, if the property were freehold, it had to be assured by deed executed by the husband and wife and duly acknowledged by the wife (*m*); if copyhold, by surrender by the husband and wife, the wife being separately examined, or in the case of an equitable estate in copyholds, by a similar surrender or by deed acknowledged (*n*); and if leasehold, by the husband's assignment with the wife's concurrence (*o*). But it has been decided that, where any hereditaments are vested in a married woman as mortgagee, the mortgage being her separate property, she can convey the same, upon repayment of the mortgage money, as if she were single (*p*). And it has been held that, if she be a trustee of the mortgage, and the hereditaments be freehold or copyhold, she can also convey them, on repayment of the money secured, as a *feme sole*; for on such repayment she becomes a bare trustee thereof (*q*). This doctrine, however, can have no application to leaseholds for years vested in a married woman as mortgagee, where she is a trustee of the mortgage money (*r*). It has been

was not a gift to the husband of a term or other chattels held by the wife *en autre droit* as executrix or administratrix; Co. Litt. 351a. But the husband alone could make a valid disposition of such term; *Thrustout v. Levick v. Coppin*, 2 W. Black. 801; 1 Rep. Husb. & Wife, 187, 188, 2nd ed.; and dispositions of such chattels by the wife alone were void; 2 Wms. Exors. 963, 964, 7th ed.

(*l*) See above, p. 914.

(*m*) Above, pp. 903, 904.

(*n*) Above, pp. 902, 903.

(*o*) Above, p. 903.

(*p*) *Re Brooke and Fremlin's Contract*, 1898, 1 Ch. 647. This ground of this decision is equally applicable in the case of leaseholds.

(*q*) *Re Hargate and Osborn's Contract*, 1902, 1 Ch. 451; see above, p. 914.

(*r*) See above, pp. 914, 919, n. (*k*).

further decided that, where a married woman is one of several mortgagees, who became entitled to lands since the Married Women's Property Act, 1882 (*s*), and has made a conveyance thereof as a *feme sole* upon a transfer of the mortgage, a subsequent purchaser is not entitled to raise the objection that she might have been a trustee of the mortgage money, where no notice of any such trust appeared upon the title (*t*). In that case, however, the lands mortgaged were freehold, and the wife alone might make a valid conveyance of them as a bare trustee. If they had been leasehold she could not have done this; and it is submitted that, in the last-mentioned decision, the wrong test was applied. Where several men are jointly entitled to leasehold lands on a trust, which is not disclosed, a purchaser taking a conveyance from them for value and without notice obtains the legal estate and is not affected in equity by the trust (*u*). But if one of such trustees were a married woman, the purchaser would not have got a good title by reason of his having had no notice of the trust; as, if the woman's husband did not assure her share of the lands, the purchaser obtained no legal estate therein. We have seen (*x*) that the Married Women's Property Act, 1882, conferred only a special and not a general capacity of conveyance on a married woman, and did not enable wives to convey their trust estates or interests in any land. It is therefore submitted that at the date of that decision it was incumbent on any one who proposed to make title through any conveyance of land made by a wife alone, to prove either that she was entitled to the estate or interest assured as her separate property, or, if she were a trustee thereof, that she had power to convey the same as a bare trustee.

(*s*), Above, p. 914.

(*t*) *Re West and Hardy's Contract*, 1904, 1 Ch. 145; see above,

pp. 238 sq.

(*u*) Above, pp. 238 sq., 565.

(*v*) Above, pp. 918, 919.

Amending
Act of 1907.

The Married Women's Property Act, 1907, which came into operation on the 1st Jan., 1908 (*y*), was passed in order to remove the inconvenient consequences of the above decision as to wives' trust estates (*z*). The first section of this Act enacts as follows:—

Sub-sect. 1.—A married woman is able, without her husband, to dispose of, or to join in disposing of, real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a *feme sole*.

Sub-sect. 2.—This section operates to render valid and confirm all such dispositions made after the 31st day of December, 1882, whether before or after the commencement of this Act, but, where any title or right has been acquired through or with the concurrence of the husband before the commencement of this Act, that title or right shall prevail over any title or right which would otherwise be rendered valid by this section.

It will be observed that this Act does not make wives' trust property their separate property, nor does it empower them to *hold* their trust property as their separate property or apart from their husbands, so as to exclude their husbands from acquiring the estates or interests therein which are given by the common or general law (*a*). The Act appears only to confer on every married woman a statutory *power* of conveyance of property held by her as trustee (*b*); and it seems that this power is to dispose alone of any property held by her solely as trustee, and to join with the other trustee or trustees in disposing of any property held by her as trustee jointly with another or others. This raises the following question: If (as appears to be the

(*y*) Stat. 7 Edw. VII. c. 18, s. 4.

(*z*) Above, p. 919.

(*a*) See above, pp. 919, 920.

(*b*) It appears that the only way in which full effect can be given to the intention apparent in the Act, is to construe it as investing wives with a statutory *power* to convey the trust property held by them. If it were to be held that the Act merely

removes their common law disability to exercise the right of alienation incident to ownership in respect of property held by them as trustees, the Act would be rendered almost nugatory, as married women would then be enabled to convey only the estate or interest vested in them in the trust property and not that vested in their husbands.

case) the husband still takes his common law estate or interest in the wife's lands held by her on trust, is the trust property (in cases where the wife is the only trustee *appointed*) held by her *solely* as trustee within the meaning of the above enactment? or is the trust property in effect vested in her jointly with her husband as trustee? Strictly speaking, it does not appear that the trust property is, in these circumstances, held by her jointly with her husband; for, whether the land were freehold, copyhold, or leasehold, they would not be joint tenants. But of freeholds in fee assured to the wife as trustee, the husband and wife would be seised at law in fee in right of the wife (*c*); and of leaseholds so assured the husband alone would be possessed in right of his wife at law (*d*); and in either case the husband would be a trustee of his legal estate or interest (*e*). Is it the fact that in such circumstances the trust property is held by the wife solely as trustee? If not, however, it would appear that, to make an effectual assurance of the trust property, the husband would still have to convey his own legal estate or interest in the land; in which case the amending Act would be rendered almost, though possibly not quite, nugatory (*f*). It is thought that the Courts would certainly struggle to give full effect to the plain intention of the Act, which appears from the words purporting to validate past dispositions. That part of the Act would be completely stultified if it were held that the Act only enables a wife to convey her own interest in the trust property to the exclusion of the estate vested

(*c*) *Polyblank v. Hawkins*, 1 Doug. 329; 1 Wms. Saund. 253, n.; *Jumpsen v. Pitchers*, 13 Sim. 327, 331, 332.

(*d*) Co. Litt. 46b.

(*e*) *Lewin on Trusts*, 32, 215, 6th ed.; 33, 270, 11th ed.; above, p. 907.

(*f*) It is conceivable, for in-

stance, that in the case of freeholds, the Act might enable the wife to convey the estate vested in herself without the necessity of acknowledgment, but yet might not empower her to convey the estate vested in her husband.

in her husband. The Act authorises the wife to dispose of the property (*g*) held by her as trustee (not merely of her own, and not her husband's, estate or interest in that property) in like manner as if she were a single woman. We have seen (*h*) that the common law enabled married women to hold as well as to *purchase* lands, though her rights were partially transferred to her husband by reason of their unity of person. It is thought therefore that, where any lands or hereditaments have been assured to or have devolved upon a wife as sole appointed trustee, the Act enables her to convey, without her husband's concurrence, the entire estate or interest which was assured to or devolved upon her, as such trustee, in those lands or hereditaments; and that the like construction must be placed on the Act as to all cases where a wife is a joint trustee, and also as to past dispositions by a married woman alone of trust property (*i*).

Married women's powers under the Settled Land Acts.

Where a married woman is entitled for her separate use or for her separate property by statute to such an estate or interest in land as would, if she were unmarried, make her a tenant for life or give her the powers of a tenant for life under the Settled Land Act, 1882 (*k*), then she alone, without her husband, has the powers of a tenant for life under that Act (*l*). Where she is so entitled otherwise than as aforesaid, she and her husband together have those powers (*m*). A

g It is thought that the word *property* is used in the Act objectively as meaning the lands, hereditaments or chattels subject to the trust. As to the various meanings of this word, see Wms. Real Prop. 3, 4, 21st ed., approved. *Re Earnshaw Wall*, 1891, 3 Ch. 156, 157.

(*h*) Above, p. 902.

(*i*) It appears necessary to consider carefully the question raised by this Act, both on account of

its importance in titles, and because it has been thought expedient to introduce a Bill in Parliament to remedy the above-mentioned omission in the Act.

(*k*) Stat. 45 & 46 Vict. c. 38; see s. 58.

(*l*) Sect. 61 (1, 5) as construed in *Bates v. Kesterton*, 1896, 1 Ch. 159, 164, and *Re Pocock and Frankerd's Contract*, ib. 302.

(*m*) Sect. 61 (2, 5); see cases cited in previous note.

restraint on anticipation annexed to her interest does not prevent her from exercising any of those powers (*n*). Where land has been assured to a married woman in fee simple, whether at law or in equity, she has not the above-mentioned powers, though she be restrained from anticipation (*o*). But it has been held that, where land is limited to the use of trustees in trust to pay the rents and profits to a married woman during her life, without power of anticipation, and after her death to the use of such persons as she shall by will appoint, and in default to the use of herself in fee, she has the powers in question (*p*).

Under the Married Women's Property Acts, 1882 and 1893 (*q*), married women now enjoy a special and very peculiar capacity of making legal contracts in respect of their separate property to which they are or may become entitled without restraint on anticipation; and any obligation so undertaken by them may be enforced after the determination of the coverture against any property to which they may then be entitled, except only that which belonged to them during coverture as their separate property subject to a restraint on alienation and the income thereof. But apart from this privilege they have no general power to make themselves liable upon any contract (*r*). The rule of the common law was that a married woman was incapable of binding herself by any act or agreement; so that any obligation which she purported to undertake by contract was absolutely void as against her (*s*). But

Married women's contracts.

At common law.

ⁿ Sect. 61 (6).

(*o*) *Bates v. Kesterton*, 1896, 1 Ch. 159.

(*p*) *Re Pocock and Prankerá's Contract*, ib. 302.

(*q*) Stats. 45 & 46 Vict. c. 75, ss. 1 (2), 19; 56 & 57 Vict. c. 63, s. 1.

(*r*) *Scott v. Morley*, 20 Q. B. D. 120; *Re Gardiner*, ib. 249; *Stog-*

don v. Lee, 1891, 1 Q. B. 661; *Pelton v. Harrison*, 1891, 2 Q. B. 422; *Re Hewett*, 1895, 1 Q. B. 328; *Softlaw v. Welch*, 1899, 2 Q. B. 419; *Barnett v. Howard*, 1900, 2 Q. B. 784; *Brown v. Dimbleby*, 1904, 1 K. B. 28.

(*s*) 1 Black. Comm. 444; *Emery v. Wase*, 5 Ves. 846; *Jumpson v. Pitchers*, 13 Sim. 327; Sug. V. &

Exceptions to
wives' in-
capacity to
contract.

although a wife could incur no liability, she might acquire a right in the nature of a chose in action under a contract made by her during coverture. She could not, however, sue in respect of any such contract during the coverture, except with the concurrence of her husband in joining her name with his own; whilst he could sue thereon in his own name without her, but she might sue alone to get the benefit of such a contract after the coverture had determined (*t*). Apart from the powers conferred by the Married Women's Property Acts, 1882 and 1893, the general incapacity of a married woman to bind herself by a contract is subject to certain exceptions; and it appears that a wife can enter into, or have entered into, a valid contract in the following instances:—

1. Wife of the king.
 2. Husband civilly dead.
 3. Trading separately in London.
 4. Wife of an alien never in England contracting as *feme sole*.
 5. During judicial separation.
1. In the case of the wife of the king (*u*).
 2. If her husband be civilly dead, or be undergoing sentence of transportation or penal servitude (*x*).
 3. By the custom of the city of London, in respect of any trade carried on by her within the city separately from her husband (*y*).
 4. If she be the wife of an alien, who has never been in England, and she purport to contract as a *feme sole* (*z*).
 5. During the continuance of a judicial separation (*a*).

P. 206; *Nicholl v. Jones*, L. R. 3 Eq. 696; *Cahill v. Cahill*, 8 App. Cas. 420; and see *Atwood v. Chichester*, 3 Q. B. D. 722; *Expte. Jones*, 12 Ch. D. 484; *Johnson v. Clark*, 1908, 1 Ch. 303, 309.

(*y*) *Phillis Kirk v. Puckwell*, 2 M. & S. 393; *Wills v. Nurse*, 1 A. & E. 65; *Dutton v. Midland Ry. Co.*, 13 C. B. 474; *De Wahl v. Braune*, 1 H. & N. 178; 1 Rop. Husb. & Wife, 213, 2nd ed.; Wms. Pers. Prop. 493, 16th ed.

(*z*) Co. Litt. 133a.

(*a*) 1 Black. Comm. 431; *Carrol v. Blencowe*, 1 Esp. 27; *Expte.*

Franks, 7 Bing. 762.

(*y*) Bac. Abr. Customs of London (D); 2 Roper on Husband and Wife, 124, 125, 2nd ed.; see *Candell v. Shaw*, 4 T. R. 361; *Beard v. Webb*, 2 B. & P. 93.

(*z*) *De Gaillon v. L'Aigle*, 1 Bos. & Pul. 357; *Kay v. Duchesse de Pienne*, 3 Camp. 123; *Borden v. Keverberg*, 2 M. & W. 61; see *Walford v. Duchesse de Pienne*, 2 Esp. 554; *Franks v. Duchesse de Pienne*, ib. 587; *De Wahl v. Braune*, 1 H. & N. 178.

(*a*) Stat. 20 & 21 Vict. c. 85, ss. 25, 26; above, p. 909.

6. After she has obtained a protection order (*b*), or a separation order (*c*).
7. A wife may enter into a binding agreement to compromise proceedings in any matrimonial cause between her husband and herself (*d*); and may in consideration of any such compromise make a valid contract to live apart from her husband. She may also enter into a binding agreement founded upon other valuable consideration than the compromise of such proceedings, to live separate from her husband (*e*). But on the compromise of any matrimonial cause or the execution of an agreement for separation, a wife has no greater capacity to dispose of her *property*, whether by conveyance or contract, than she has at any other time (*f*). So that if she be entitled to freeholds at common law, she cannot dispose of any interest therein, as a part of any such compromise or agreement, except as provided by the Fines and Recoveries Act (*g*). And it appears that, if she be entitled to separate property subject to a restraint on alienation, she cannot make any disposition thereof, either by way of conveyance or contract, as a term of any such compromise or agreement (*h*).
8. In a policy of insurance effected by a married
6. After protection or separation order.
7. To compromise a matrimonial cause, or to live apart from her husband.
8. Policy of insurance

b Stat. 20 & 21 Vict. c. 85, s. 21; above, p. 911.

c Stat. 58 & 59 Vict. c. 39, ss. 4, 5; above, p. 911.

d *Wilson v. Wilson*, 1 H. L. C. 528; *Rowley v. Rowley*, L. R. 1 Sc. App. 63; *Besant v. Wood*, 12 Ch. D. 605, 621; *Rose v. Rose*, 8 P. D. 98; *Cahill v. Cahill*, 8 App. Cas. 420, 429, 435, 436.

e *Hunt v. Hunt*, 4 De G. F. & J. 221; *Marshall v. Marshall*, 5 P. D. 19; *Besant v. Wood*, 12 Ch. D. 605; *Clark v. Clark*, 10 P. D. 188; *Aldridge v. Aldridge*,

13 P. D. 210; *McGregor v. McGregor*, 20 Q. B. D. 529; *Re Weston*, 1900, 2 Ch. 164.

f *Stanger v. Barker*, 5 Madd. 157; *Slatter v. Slatter*, 1 Y. & C. Ex. 28; *Varsittart v. Varsittart*, 4 K. & J. 62; *Cahill v. Cahill*, 8 App. Cas. 420; *Hark v. Jernam*, 1895, 2 Ch. 419.

g *Cahill v. Cahill*, 8 App. Cas. 420; *Hark v. Jernam*, 1895, 2 Ch. 419; see above, p. 903.

h See cases cited above, p. 908, n. *c*; *Cahill v. Cahill*, 8 App. Cas. 420, 429, 430.

under Married
Women's
Property Act,
1870.

woman before the year 1883 on her own life or the life of her husband for her separate use by virtue of the Married Women's Property Act, 1870 (*i*).

Wife's
contract
operating as
a disposition
of property.

Wife's
contract to
exercise a
power.

Besides these exceptional cases, in which a married woman appears to be enabled to enter into a perfect contract binding herself personally at law, her agreement may, in certain instances, operate as a disposition of property (*k*). Thus where a married woman is entitled to a general power of appointment over any property and contracts by some instrument not complying with all the formalities required by the power to exercise the same in favour of a purchaser, effect will be given to the contract in equity by way of relief against the defective execution of the power and the specific enforcement of the disposition so made against those entitled in default of appointment (*l*) in the

(*i*) Stat. 33 & 34 Vict. c. 93, s. 10, repealed, except as to acts done and rights acquired thereunder, by stat. 45 & 46 Vict. c. 75, s. 22, and replaced by s. 11 of that Act, which, however, only enables a wife to effect such a policy by virtue of the power of contracting given to her by that Act.

(*k*) The essence of a true contract at law is the creation of an obligation binding the contractor personally; and it is foreign to the nature of a contract that it should bind or affect the contractor's property until he has been sued thereon and judgment given against him, or that its validity should depend on the fact of the contractor's being possessed of property at the time either of making or of enforcing the agreement; see *Turner, L. J., Johnson v. Gallagher*, 3 De G. F. & J. 494, 519, 520; *James, L. J., Pals v. Fitzgibbon*, 17 Ch. D. 454,

461. Where a married woman entitled to property of which she is restrained from anticipating the income, enters into one of these exceptional contracts by which she can bind herself personally at law, execution of a judgment against her in an action on the contract cannot be had against such property so long as it is affected by the restraint; *Hill v. Cooper*, 1893, 2 Q. B. 85; see above, pp. 907, 908; *Hyde v. Hyde*, 13 P. D. 166; *Hood Barrs v. Catheart*, 1894, 2 Q. B. 559, 567 sq.; *Hood Barrs v. Heriot*, 1896, A. C. 174; *Whiteley v. Edwards*, 1896, 2 Q. B. 48; *Bolitho & Co., Ltd. v. Gidley*, 1905, A. C. 98.

(*l*) *Dowell v. Dew*, 1 Y. & C. C. C. 315; *Thackwell v. Gardiner*, 5 De G. & S. 58, 65; *Sug. Pow.* 536, 537, 8th ed.; 2 *Dart, V. & P.* 1000, 1001, 5th ed.; 1120, 1121, 6th ed.

same manner as if she had been a single woman or a man (*m*). But in such cases, the Court must be satisfied that the formalities which have not been observed are no more than matters of form; and that the donee of the power has not, by their non-observance, been deprived of any of the protection, which a due exercise of the power would have afforded her. Otherwise the Court will not relieve against the defective execution of the power (*n*). Again, where a married woman is entitled to any interest in land, of which she can only dispose by deed acknowledged with her husband's concurrence under the Fines and Recoveries Act (*o*), and by such a deed she enters into a contract which would, if she were *sui juris*, bind her interest in equity—for example, a contract to sell, mortgage or settle the same—then such contract will operate in equity as an effective disposition of her interest (*p*).

Wife's contract made with the formalities required by the Fines and Recoveries Act.

Under the rules of equity, a married woman had power to bind any separate estate, to which she was entitled *without* restraint on anticipation, by her general pecuniary engagements entered into with respect thereto (*q*); and such engagements might be enforced, by suit against her in a Court of Equity, out of any such separate estate, to which she was entitled at the time of entering into the engagement, but not against any separate estate, to which she might thereafter have become entitled, or which she was restrained from anticipating (*r*). But such engagements did not create any lien on the separate estate, out of which they might be enforced, so as to prevent the wife from alienating

Wives' general engagements in equity.

(*m*) Above, pp. 296, 538, 539.

(*n*) *Thackwell v. Gardiner*, 5 De G. & S. 58, 65; see above, p. 296.

(*o*) Above, pp. 903–905, 914.

(*p*) *Crofts v. Middleton*, 8 De

G. M. & G. 192; Sug. V. & P. 207; 2 Dart. V. & P. 999, 1000, 5th ed.; 1119, 1120, 6th ed.

(*q*) Above, p. 908.

(*r*) *Pike v. Fitzgibbon*, 17 Ch. D. 454.

Specific performance of contract disposing of a wife's separate estate.

Wife purchasing land with her separate estate.

Married woman contracting in respect of her separate estate might enforce specific performance.

the same (*s*). And they did not involve her in any legal liability, and so could not be enforced after the determination of the coverture either against her personally or so as to affect any property to which she might then be entitled, except that which was already bound by the engagements (*t*). If a wife entitled to any separate estate without restraint on anticipation made a particular disposition thereof by way of contract such as would have entitled the other party to sue for specific performance, in case she had been a *feme sole*—as if she contracted to sell or mortgage any land forming part of such separate estate—then the contract would be specifically enforced in equity against the property so disposed of and all persons succeeding to her estate therein (*u*) ; and also against the wife herself after the determination of the coverture (*x*). But no decree would be made against the married woman personally for specific performance of the contract, so long as she remained under the same coverture as existed at the time of entering into the agreement (*y*). And if a married woman, having separate estate free from any restraint, contracted to buy land, the contract was enforceable in equity as a general engagement binding her separate estate, and not otherwise ; and a decree for specific performance would not be made against her personally (*z*). But a married woman, who had sold land forming part of her separate estate or bought land with her separate estate, might herself enforce the contract specifically ; and the fact, that the contract was enforceable as above mentioned against her separate

(*s*) *Pike v. Fitzgibbon*, 17 Ch. D. 469, 461.

(*t*) *S. C.*

(*u*) Except, of course, purchasers of the legal estate therein for value and without notice ; above, p. 565.

(*x*) *Grigby v. Cox*, 1 Ves. sen. 517 ; *Stead v. Nelson*, 2 Beav. 245 ; *Wainwright v. Hardisty*, ib. 363 ;

Sug. V. & P. 206.

(*y*) *Aylett v. Ashton*, 1 My. & Cr. 105, 111 ; *Waine v. Routledge*, L. R. 18 Eq. 497, 500.

(*z*) *Francis v. Wigzell*, 1 Madd. 258 ; *Picard v. Hine*, L. R. 5 Ch. 274 ; see also *Gaston v. Frankum*, 2 De G. & S. 561, reversed on other grounds, 16 Jur. 507.

property (though not against her personally), was sufficient to prevent the other party from raising the defence of want of mutuality (*a*).

With regard to wives' contracts under the Married Women's Property Acts, 1882 and 1893 (*b*):—It is enacted in the Act of 1882 (*c*) that a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise. According to the judicial construction of this enactment, a married woman is not thereby enabled to render herself liable on any contract, otherwise than in respect and to the extent of her separate property (*d*). Consequently, although a breach of a wife's contract to pay money or a judgment against her for breach of her contract made under the Act will result in a debt due from her, which may be the subject of a set-off (*e*), will be an ante-nuptial debt in case she marry again (*f*) and will, if a judgment debt, entitle the judgment creditor to issue execution by way of garnishee order against her (*g*), yet she does not incur thereby the same personal

Wives' contracts under the Married Women's Property Acts.

Nature of their liability thereunder.

(*c*) *Francis v. Wigzell*, 1 Madd. 258, 261-264; *Dawling v. Maguire*, Ll. & G. t. Plunk. 1, 9, 15, 19, 20; 2 Dart, V. & P. 1045, 5th ed.; 1162, 6th ed.

(*b*) Above, p. 918.

(*c*) Stat. 45 & 46 Vict. c. 75, s. 1 (2).

(*d*) *Scott v. Morley*, 20 Q. B. D. 120; *Re Trenchard*, 1900, 1 Ch. 180, 184.

(*e*) *Pelton v. Harrison*, 1892, 1 Q. B. 118.

(*f*) *Jay v. Robinson*, 25 Q. B. D. 467.

(*g*) *Holthj v. Hodge*, 24 Q.

liability to pay as is incumbent on an indebted man or single woman. She cannot therefore be imprisoned under the Debtors Act, 1869 (*h*), for failure to satisfy any such judgment (*i*). Nor can any liability to pay money incumbent on her by virtue of any such contract be enforced by the attachment of her person, in cases where that process would be available against her if she were a single woman (*k*). Nor is she liable to be made bankrupt by reason of any such debt or judgment (*l*); except by special provision of the Act (*m*), in the case of her carrying on a trade separately from her husband (*n*). Under such a judgment, it has been held, execution shall only issue against the wife's separate property; and as the Act is not to interfere with any restriction against anticipation (*o*), it has been held, by analogy to the previous law respecting a wife's general engagements (*p*), that the separate property which can be taken to satisfy a wife's liability upon her contract is limited to that to which she is entitled without restraint on anticipation (*q*). But by the Act of 1882, where a wife made a valid contract thereunder, any separate property to which she might afterwards during the coverture become entitled, without restraint on anticipation, was made liable to satisfy her liabilities so incurred (*r*). And under the same Act it was decided that, where judgment was obtained against a wife (whilst covert) in an action on her contract made

Separate
property
subject to a
restraint on
anticipation.

B. D. 103; *Lady Aylesford v. Great Western Ry. Co.*, 1892, 2 Q. B. 626.

(*h*) Stat. 32 & 33 Vict. c. 62, s. 5; Wms. Pers. Prop. 207, 16th ed.

(*i*) *Scott v. Morley*, 20 Q. B. D. 120.

(*k*) *Re Turnbull*, 1900, 1 Ch. 180.

(*l*) *Re Gardiner*, 20 Q. B. D. 249; not even after the coverture has ceased: *Re Horcott*, 1895, 1 Q. B. 328.

(*m*) Stat. 45 & 46 Vict. c. 75, s. 1 (3); 46 & 47 Vict. c. 52,

s. 152; Wms. Pers. Prop. 242, 16th ed.

(*n*) See *Re Handford*, 1899, 1 Q. B. 566.

(*o*) Stat. 45 & 46 Vict. c. 75, s. 19; above, p. 915.

(*p*) Above, p. 929.

(*q*) *Scott v. Morley*, *ubi sup.*; *Pelton v. Harrison*, 1891, 2 Q. B. 422.

(*r*) Stat. 45 & 46 Vict. c. 75, s. 1 (4), repealed and replaced by stat. 56 & 57 Vict. c. 63, ss. 1, 4; see note (*y*), below, p. 933.

during the coverture, arrears then accrued due but unpaid of income, which she was restrained from anticipating, might be taken to satisfy the judgment (*s*), though not arrears of such income accruing due after the date of the judgment (*t*). It was further held, that a wife could not be made liable under the Act of 1882 in respect of any contract, unless she had some separate property to which she was entitled without restraint on anticipation, at the time when she made the contract (*u*); and that a wife's contract was not enforceable after the coverture had ended, against any property which had not been her separate property during the coverture (*x*). But in these last respects the law has been altered by the Married Women's Property Act, 1893 (*y*), enacting that every contract thereafter entered into (*z*) by a married woman, otherwise than as agent (*a*), shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; and such contract shall bind all separate property which she may at that time or thereafter be possessed of or entitled to, and shall also be enforceable by process of law against all property which she may thereafter, while discover, be possessed of or entitled to; provided that these amending enactments shall not render available to satisfy any liability or

Married
Women's
Property
Act, 1893.

(*s*) *Hood Barrs v. Heriot*, 1896, A. C. 174.

(*t*) *Whiteley v. Edwards*, 1896, 2 Q. B. 48; *Bolitho & Co., Ltd. v. Gidley*, 1905, A. C. 98.

(*u*) *Palliser v. Gurney*, 19 Q. B. D. 519; *Leak v. Driffield*, 24 Q. B. D. 98; *Pelton v. Harrison*, 1891, 2 Q. B. 422; *Re Fieldwick*, 1909, 1 Ch. 1.

(*x*) *Stogdon v. Lee*, 1891, 1 Q. B. 651; *Pelton v. Harrison*, 1891, 2 Q. B. 422; *Softlaw v. Welch*,

1899, 2 Q. B. 419.

(*y*) Stat. 56 & 57 Vict. c. 63, s. 1, passed 5th Dec. 1893, replacing with amendments stat. 45 & 46 Vict. c. 75, s. 1, sub-ss. 2, 4, the latter of which provided that a wife's contract should bind all separate property which she might acquire after the contract.

(*z*) See *Re Wheeler*, 1904, 2 Ch. 66.

(*a*) See *Pogara, Ltd. v. Broker*, 1906, A. C. 148.

Effect of that Act as to property subject to a restraint on anticipation.

obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating. It has been held since this Act that, where a married woman has made a contract thereunder and was entitled to some separate property subject to a restraint on anticipation, and judgment in an action on the contract has been obtained against her after the determination of the coverture, neither the capital of that property nor any arrears of the income thereof accrued due at the date of the judgment can be taken or attached in execution of the judgment (*b*). And the effect of the construction so put upon this Act seems to be that, where judgment is obtained against a wife (whilst covert) in an action on her contract made during the coverture and since the Act, no arrears accrued due or savings made after the date of the contract of any income, which she is restrained from anticipating, can be taken to satisfy the judgment (*c*). The Act of 1893 also gives jurisdiction to the Court, before which any action or proceeding instituted by a woman or by a next friend on her behalf is pending, to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and to enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just (*d*).

Costs against married women in proceedings instituted by them.

Specific performance by or against a married woman.

A married woman contracting, under the powers given to her by the Married Women's Property Acts,

(*b*) *Barnett v. Howard*, 1900, 2 Q. B. 784; *Brown v. Dumbleby*, 1904, 1 K. B. 28; see *Sprange v. Lee*, 1908, 1 Ch. 424, 432.

(*c*) As regards contracts there-after made, the Act of 1893 appears to alter the law laid down in *Hood Bares v. Heriot*, above, p. 833, n. (*a*).

(*d*) Stat. 56 & 57 Vict. c. 63, s. 2, amending the law laid down

in *Re Glanville*, 31 Ch. D. 532; *Cox v. Bennett*, 1891, 1 Ch. 617; but not retrospective; *Re Lumley*, 1894, 3 Ch. 135. A counterclaim is such a proceeding; *Hood Bares v. Cathcart*, 1895, 1 Q. B. 873. See *Gordon v. Gordon*, 1904, P. 163; *Pawley v. Pawley*, 1905, 1 Ch. 593; *Dyssel v. Ellis*, 1905, 1 K. B. 574.

1882 and 1893 (*e*), either to sell land, which is her separate property without restraint on anticipation, or to buy land, may herself enforce the specific performance of the contract by the other party thereto (*f*); and she may be sued and judgment may be given against her personally for specific performance of such a contract, subject, however, to the limitations imposed by the judicial construction of these Acts (*g*) upon her liability under any such judgment. It remains to be decided to what extent, if at all, a married woman is liable to process of contempt in case of her disobedience to any order (such as an order for conveyance of the property sold (*h*)) made against her in an action to enforce the specific performance of such a contract. But a married woman may be attached or committed for disobedience to an order of the Court directing her to do some act, which does not involve the satisfaction of a pecuniary liability assumed by her under her contract made by virtue of the Married Women's Property Acts (*i*). And an order directing a married woman to do any such act within a limited time may be enforced by writ of sequestration (*k*) against all her separate property to which she is then entitled without restraint on anticipation (*l*).

(*e*) Above, pp. 931 *sq.*

(*f*) Above, pp. 930, 931.

(*g*) Above, pp. 931—934.

(*h*) See Seton on Judgments, 2285, 2287, 6th ed.

(*i*) *Re Turnbull*, 1900, 1 Ch. 180; R. S. C. 1883, Order XLII. rule 7; see above, p. 932.

(*k*) R. S. C. 1883, Order XLIII. rule 6.

(*l*) See above, pp. 908, 918; *Hyde v. Hyde*, 13 P. D. 166. It appears that, if the order were to do some act agreed to be done by the wife under her contract made by virtue of the Married Women's

Property Act, 1893, arrears accrued due or savings made after the date of the contract of income, which she was restrained from anticipating, could not be attached under a sequestration for default of compliance with the order; see above, p. 932. As to a sequestration issuing for default of compliance by a wife with an order for payment of costs made against her in any proceeding instituted by her, see above, pp. 932—934, and n. (*l*); R. S. C. 1883, Order XLIII. rule 7; *Huddest v. Cathcart*, 1896, A. C. 470.

Wife trustee
for sale.

Before the Married Women's Property Act, 1882 (*m*), a married woman, who was a trustee for sale of land, could not enter into a contract for the sale thereof, which would effectually bind her (*n*). A decree for the specific performance of the contract could not therefore be obtained either against her (*n*), or (for want of mutuality) in her favour (*o*). But it seems that she may now enter into such a contract, and that she herself and her separate property would be liable, to the extent permitted by the Married Women's Property Acts, 1882 and 1893 (*p*), for the due performance of the agreement; notwithstanding that the trust estate sold is not her separate property (*q*).

Contract
induced by a
married
woman's
misrepresen-
tation.

Where a contract made with a married woman has been induced by her misrepresentation, whether innocent or fraudulent, the other party has the same rights in respect of the rescission or of avoiding the specific performance of the contract as if she were single (*r*). But if the false representation were made fraudulently, she is not equally liable to an action of deceit as if she were unmarried. A false representation fraudulently made by a married woman, like any other tort committed by her, was in general a good cause of action against her at common law, and still remains so (*s*). But at common law she could only be sued therefor jointly with her husband, so long as the coverture lasted (*t*); though after its dissolution by death or divorce, the husband's liability to be so sued ended (*u*), whilst the

Wife's
liability for
her fraud.

(*m*) Above, pp. 925, 931.

(*n*) *Avery v. Griffin*, L. R. 6 Eq. 606; above, p. 930.

(*o*) Fry, Sp. Perf. § 461, 3rd ed.

(*p*) Above, pp. 931 *sq.*

(*q*) See Neville, J., *Sprange v. Lee*, 1908, 1 Ch. 424, 432; above, pp. 919, 922.

(*r*) Above, pp. 806, 812, 828.

(*s*) *Liverpool Adelphi Loan As-*

sociation v. Fairhurst, 9 Ex. 422, 429; *Wright v. Leonard*, 11 C. B. N. S. 258; *Earle v. Kingscote*, 1900, 1 Ch. 203, 2 Ch. 585.

(*t*) Bac. Abr. Baron and Feme, (K, 1); 1 Black. Comm. 443; *Head v. Briscoe*, 5 C. & P. 484.

(*u*) *Higgins' case*, Noy, 18; *Capel v. Powell*, 17 C. B. N. S. 743. But if the wife died or the

wife surviving remained liable to be sued alone (*x*). At the present time, the wife may be sued for any wrong done by her during the coverture either alone under the Married Women's Property Act, 1882 (*y*), or together with her husband according to the old law (*z*). It was held at common law, however, in consequence of a married woman's incapacity to bind herself by contract (*a*), that if by her fraudulent misrepresentation (as by stating that she was unmarried) she induced any one to enter into a contract with her, she could not be made liable in any proceedings in tort to recoup the other party his damages caused by her failure to carry out her agreement (*b*). As the Married Women's Property Acts, 1882 and 1893 (*c*), have only given to married women a limited and special capacity to contract not involving their complete personal liability (*d*), and have not increased a wife's liability for her torts otherwise than by permitting an action thereon to be brought against her without her husband, it appears that this exception to a wife's liability for her fraud still remains in force, and that where her fraud has been the means of inducing another to contract with her, no action therefor will lie either against her and her husband or against herself alone (*e*). In other words, it seems that a married woman cannot by means of her own fraud enlarge the limited capacity of contracting bestowed on her by the Married Women's Property Acts (*f*), so as to

marriage were dissolved after judgment in such an action, the husband remained liable on the judgment, which was given against them jointly; see *Wms. Pers. Prop.* 490, 499, 500, 16th ed.

(*x*) *Capel v. Powell*, 17 C. B. N. S. 743.

(*y*) Above, p. 931.

(*z*) *Seroka v. Kattenburg*, 17 Q. B. D. 177; *Earle v. Kingscote*, 1900, 2 Ch. 585; *Brammont v. Kaye*, 1901, 1 K. B. 292; but see

Moulton, L. J., Cheneil v. Leslie, 1909, 1 K. B. 880, taking a view similar to that urged by the writer in L. Q. R. xvi. 191.

(*a*) Above, p. 925.

(*b*) *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Ex. 422.

Cf. above, p. 873, and n. (*r*).

(*c*) Above, pp. 925, 931.

(*d*) Above, pp. 931—934.

(*e*) See *Earle v. Kingscote*, 1900, 1 Ch. 203, 208, 2 Ch. 585, 588 sq.

(*f*) Above, pp. 925, 931 sq.

assume a personal liability for her default in making good her agreement. This exception is, however, confined to cases where the wife's fraud has been the means of inducing the other party to contract with her; and where a married woman, who had already entered into a contract with another, subsequently made a false representation to him as to a fact, which was a condition precedent to his performing his part of the agreement, she and her husband were held to be liable in an action of deceit brought against them for the wrong so committed (*g*).

Estoppel by
conduct of a
married
woman.

A married woman might, notwithstanding her coverture, be subject in equity to an estoppel by reason of her conduct so as to deprive herself of her rights in any land or property. Thus if by her misrepresentation, whether in the form of the positive assertion of an untruth or of active concealment of her interest, she induced another person to take for valuable consideration a conveyance of any property inconsistent with her own rights therein, the Courts of Equity would not permit her to take advantage of her own deceitful conduct and would accordingly restrain her from asserting her rights in derogation of the conveyance and compel her to give effect thereto (*h*). This rule was applied in equity whether the wife were entitled to the property affected at common law or in equity, and if in equity, whether for her separate use or not (*h*): but she could not so deprive herself of any interest, as to which she was restrained from anticipation (*i*). Where a wife

g *Earle v. Kingscott*, ubi sup.
h *Savage v. Foster*, 9 Mod. 35;
Nicholl v. Jones, L. R. 3 Eq. 696,
709; *Sharpe v. Foy*, L. R. 4 Ch.
35; *Re Lush's Trusts*, ib. 591.
Cf. above, p. 873. In *Nicholl v.*
Jones, ubi sup., it was held that,
as the other party was aware of

the wife's interest and of her
incapacity, he was not misled by
her conduct: see above, p. 612.

(*i*) *Jackson v. Hobhouse*, 2 Mer.
483, 488; *Stanley v. Stanley*, 7
Ch. D. 589; *Bateman v. Faber*,
1898, 1 Ch. 144.

is entitled to any separate property under the Married Women's Property Act, 1882 (*k*), she may of course be deprived of her rights therein by estoppel in the same way: but not so as to interfere with the effect of any restraint on anticipation attached thereto (*l*).

It was also held in equity that a married woman might be put to her election, under the equitable doctrine in that behalf, whether she would claim under or against some instrument conferring a benefit on her and at the same time purporting to dispose of her property; and an inquiry would be directed, which alternative it would be most beneficial for her to select, and a choice made by the Court on her behalf accordingly (*m*). Her election so exercised would in equity bind her estate or interest in any land (*n*) affected thereby, whether she were entitled thereto at common law or in equity, and although it were not evidenced with the formalities prescribed by the Fines and Recoveries Act or otherwise necessary for her alienation of the land (*o*). *A fortiori*, she might elect in the same manner as if she were a *feme sole* so as to bind any property settled for her separate use without restraint on anticipation (*p*), and may do so with regard to any separate property, to which she is entitled without such restraint under the Married Women's Property Act, 1882 (*q*). But if her

Election by a married woman.

(*k*) Above, pp. 911 *sq.*

(*l*) Above, p. 918.

(*m*) *Cooper v. Cooper*, L. R. 7 H. L. 53, 79. But it appears that she might signify her election by her conduct; see *Greenhill v. North British and Mercantile Insurance Co.*, 1893, 3 Ch. 474, 480.

(*n*) A married woman might also so elect as to affect her interest in any personality: *Griggs v. Gibson*, L. R. 1 Eq. 685: except, it seems, her reversionary chose in action not alienable under Malins' Act, stat. 20 & 21 Vict.

c. 57; *Whittle v. Henning*, 2 Ph. 731; *Williams v. Mayne*, 1 R. 1 Eq. 519; see, however, *Greenhill v. North British and Mercantile Insurance Co.*, 1893, 3 Ch. 474, commented upon in *Harle v. Jarman*, 1895, 2 Ch. 419.

(*o*) *Ardesoife v. Bennet*, 2 Dick. 463; *Barrow v. Barrow*, 4 K. & J. 409; *Willoughby v. Middleton*, 2 J. & H. 344; *Griggs v. Gibson*, L. R. 1 Eq. 685, 691.

(*p*) See *Re Davidson*, 11 Ch. D. 341, 348.

(*q*) Above, pp. 911 *sq.*

own property dealt with by the instrument be subject to a restraint on alienation, she cannot by her election or any other act *in pais* deprive herself of the benefit thereof (*r*). And it appears that in this case her only obligation is to confirm the instrument conferring a benefit on her so far as she can; and that, as she has no alienable interest in the property of her own thereby disposed of, she is not affected by the doctrine of election and may take the benefit given to her without compensating those to whom the instrument purported to convey her own property (*s*). Where the instrument, which confers a benefit on her, gives it to her with a restraint on anticipation, it is held that this shows the settlor's intention to be that she shall not be put to her election; and in such case she is entitled to retain the benefit conferred without making any conveyance of her own property to give effect to the disposition thereof, which the instrument purported to make (*t*).

Married woman affirming or avoiding her voidable conveyance or contract made whilst single and in infancy.

It has been held of late years that, where a female infant has made whilst unmarried a voidable conveyance of her property, or a voidable contract operating in equity as a disposition of her property, and has afterwards married during her infancy, her coverture is no bar to her exercising her choice of avoiding or affirming the conveyance or contract; which is therefore fully binding, if not repudiated by her within a reasonable

r *Robinson v. Wheelwright*, 21 Beav. 214, 6 De G. M. & G. 555; *Bateman v. Faber*, 1898, 1 Ch. 144.

s This appears to follow from the principles applied in *Re Chessham*, 31 Ch. D. 466. It may, perhaps, be contended that she would at least be bound to apply for an order of the Court removing the restraint (see above,

p. 908). But it is thought that, as the making of this order is no mere formality, but lies in the discretion of the Court, the possibility of obtaining it does not give her an alienable interest, and so cause her to be put to her election.

t *Re Vardon's Trusts*, 31 Ch. D. 275; *Haynes v. Foster*, 1901, 1 Ch. 361.

time after she has attained full age (*u*). This ruling is unquestionably correct where the property affected would in case of the wife's repudiation of her voidable conveyance or contract belong to her for her separate use or as her separate property under the Married Women's Property Act, 1882; for she can dispose of all such property as if she were a *feme sole* (*x*). But as applied to property, to which on repudiation the wife would be entitled under the old law, and especially where the property disposed of in infancy was her reversionary chose in action (*y*), the doctrine so laid down appears to be at variance with the law of married women's incapacity, as previously understood (*z*). The rule in question has no application where the infant on her marriage becomes subject to some foreign law, by which she is deprived

(*u*) *Wilder v. Pigott*, 22 Ch. D. 263; *Burnaby v. Equitable Reversionary Interest Socy.*, 28 Ch. D. 416; *Re Hodson*, 1894, 2 Ch. 421; *Viditz v. O'Hagan*, 1900, 2 Ch. 87, 96—98, 100; above, pp. 871, 881.

(*x*) *Smith v. Lucas*, 18 Ch. D. 531, 544; above, pp. 907, 915, 917.

(*y*) See cases cited in the last note but one.

(*z*) See *Whittle v. Henning*, 2 Ph. 731; *Ellison v. Elwin*, 13 Sim. 309; *Le Vasseur v. Scrutton*, 14 Sim. 116; *Williams v. Mayne*, I. R. 1 Eq. 519; none of which were cited in the cases mentioned in note (*u*). And note that it was considered that a wife's capacity to agree to a conveyance made to her was suspended during her coverture; above, p. 902, n. (*f*). It is submitted that in the cases cited in note (*u*), the judges confused the doctrine of election, to take under or against an instrument, which is a matter depending purely on the rules of equity and the equitable principles of estoppel by conduct (above, pp. 938—940), with the election or choice of affirming or

disaffirming a voidable conveyance or contract. This, it is thought, is properly a matter depending on the party's capacity at common law; and by the common law, a woman's capacity in this respect appears to have been suspended during her coverture. It is not denied that, where by the instrument effecting the voidable conveyance or contract, the infant has derived benefits from other sources, she may be put to her election whether she will claim under or against the instrument: and it appears that *Wilder v. Pigott*, 22 Ch. D. 263, 267, was really a case of this kind of election; though even so regarded it is in conflict with *Williams v. Mayne*, I. R. 1 Eq. 519. But in *Re Hodson*, 1894, 2 Ch. 421, it does not appear that there was any ground to put the wife to her election to take under or against her settlement, which seems to have comprised her own property alone; and it is submitted that Chitty, J., certainly confused this sort of election with the legal capacity of affirming a voidable conveyance.

during her coverture of the capacity of giving her full consent to the conveyance or contract so made before her marriage (*a*).

Title to English land may be affected by the marriage of the owner, while domiciled abroad.

R. De Nicols.

In connexion with the law of husband and wife, it may be mentioned that, according to a recent decision (*b*), the title to land situate in England, but belonging to a man or a woman, who is or was domiciled elsewhere and married while domiciled abroad, may be affected by the law of the country, in which the marriage took place. In the case referred to, a Frenchman domiciled in France married there a Frenchwoman without any express contract as to their property, so that by French law they came under the rule of community of goods. The pair then came to England and acquired an English domicile, and the husband became the owner of freehold and leasehold land in England. It was held that, on the husband's death, the wife was entitled, according to the law of community of goods under which she married, to one half of this land (*c*), as well as of his moveable goods (*d*), and that these rights must prevail over his testamentary dispositions of his property. The grounds of this decision were that the marriage under the French rule of community of goods constituted an implied contract between the parties as to their proprietary rights, which was equivalent to an express contract to the same effect, and that this contract was provable by parol evidence, notwithstanding the Statute of Frauds (*e*), on the same principle as has been applied in the case of

a *Fiddell v. O'Hagan*, 1900, 2 Ch. 87; see above, p. 871, and n. (*iii*). It may be remarked that the principle, on which this decision is based, may be invoked against the doctrine laid down in the other cases cited in note (*a*), p. 941, above, as according to the older authorities it was exactly this capacity which was denied

to married women by the common law.

b *R. De Nicols*, 1900, 2 Ch. 110.

c *Ibid.*

d *R. De Nicols v. Currier*, 1900, A. C. 21.

e Stat. 29 Car. II. c. 3, ss. 4, 7.

parol agreements of partnership affecting land (*f*). But of course the wife did not in that case acquire any legal estate or interest in her husband's lands or goods in England. Her rights were contractual only at law, and her interest in the property was merely equitable. So that, although she was enabled to enforce her rights specifically against her husband's devisees of the land, she would have had no equity or other claim against a purchaser from them taking the legal estate in the lands for value without notice of the marriage contract (*g*).

Corporations, as conceived by the common law, have Corporations. as full capacity to *purchase*, hold and dispose of lands as any natural person, who is free from disability (*h*). But under the Mortmain and Charitable Uses Act, 1888 (*i*), which in this respect repealed and replaced the Mortmain Act of Edward I. and other statutes (*k*), the assurance (*l*) of land (*m*) to or for the benefit of a corpora-

(*f*) *Forster v. Hale*, 3 Ves. 696, 5 Ves. 308; *Dale v. Hamilton*, 5 Hare, 369; *Gray v. Smith*, 43 Ch. D. 208, 211.

(*g*) Above, pp. 565 sq.

(*h*) *Case of Sutton's Hospital*, 10 Rep. 23, 29b—31a; 1 Black. Comm. 475; *Colchester v. Loutton*, 1 V. & B. 226, 246; Blackburn, J., *Riche v. Ashbury, &c. Co.*, L. R. 9 Ex. 224, 263; *British South Africa Co. v. De Beers, &c., Ltd.*, 1910, 1 Ch. 354, 374—376; affd. 1910, 2 Ch. 502; and see Co. Litt. 2a, 2b, 13b, 94b, 44a, 250a, 300b, 301a, 325b. It should be noted, however, that, before the Wills Act, 1837, a devise of land to or in trust for a corporation was invalid, unless the corporation were empowered by statute to take land by devise; for the old statutes authorising the alienation of fee simple estates by will did not permit of the devise of land in favour of a corporation; stats. 32 Hen. VIII. c. 1; 34 & 35 Hen. VIII. c. 5, s. 4; 1 Jarm.

Wills, 65—67, 4th ed.

(*i*) Stat. 51 & 52 Vict. c. 42, s. 1.

(*k*) Stats. 7 Edw. I. st. 2; 13 Edw. I. c. 32; 18 Edw. III. st. 3, c. 3; 15 Ric. II. c. 5.

(*l*) As to the meaning of *assurance* in this Act, see above, pp. 446, n. (c), 456.

(*m*) Here including tenements and hereditaments, corporeal or incorporeal, of any tenure; see stat. 54 & 55 Vict. c. 73, s. 3, replacing 51 & 52 Vict. c. 42, s. 10 (iii); above, p. 449. It appears that the old Statutes of Mortmain did not prevent a corporation from taking a lease of lands for a term of years unless so limited as to be in effect perpetual; or from taking any interest in lands, which would not be perpetual; see Vin. Abr. Mortmain (B. 20—22); *Jesus Coll. v. Gibbs*, 1 Y. & C. 145, 147, 148; *Tigers v. Dean of St. Paul's*, 18 L. J. Q. B. 97, 103; Tudor, Charitable Trusts, 429, 4th ed. As the Mortmain Act of 1888 is a con-

Mortgage of
land to a
corporation.

Assurance of
land in trust
for a corpora-
tion.

tion in mortmain, otherwise than under the authority of a royal licence or a statute, is a cause of forfeiture to the lord of the fee; or if he fail to enter within a year, to his superior lord (*n*); and in default of entry thereon by any mesne lord, to the Crown (*o*). It follows that a corporation, although it may *purchase* lands, cannot retain them without being especially enabled to hold lands either by a licence from the Crown (*p*), or by an Act of Parliament (*q*). This applies to land assured to a corporation by way of mortgage as well as for its own use absolutely (*r*). And lands vested in trustees on trust for a corporation, or otherwise assured to a corporation in equity, without the authority of such licence or statute, are equally liable to forfeiture with those in which the corporation has taken a conveyance of the legal estate (*s*). The instances in which corporations are empowered by statute to hold land without a licence in mortmain are too numerous to be particularly mentioned in a work like the present. Some particular corporations are authorised by Act of Parliament to

solidation Act, these cases appear to be authorities upon its construction; above, p. 454, and *n. b*.

(*n*) Any superior lord must enter within six months after his inferior's right of entry has expired.

(*o*) Under the old Statutes of Mortmain the Crown could not enter for such a forfeiture until after office found; 3 Black. Comm. 258, 259; *Doe v. Redfern*, 12 East. 96, 114; *Doe d. Evans v. Evans*, 5 B. & C. 587, *n.*; but the necessity of an inquest of office as a condition precedent to the exercise of a right of re-entry by the Crown was abolished by stat. 22 & 23 Vict. c. 21, s. 25.

(*p*) Stat. 51 & 52 Vict. c. 42, s. 2, replacing 7 & 8 Will. III. c. 37; see Co. Litt. 2b, 99a, and *n. 11*; 2 Black. Comm. 268 *sq.*; Wms. Real Prop. 76, 77, 21st ed.

(*q*) Sug. V. & P. 685.

(*r*) See Shelford on Mortmain, 10, *n. (e)*. By stat. 33 & 34 Vict. c. 34, corporations in the United Kingdom holding moneys in trust for any public or charitable purpose may invest such moneys on any real security authorised by or consistent with the trust without incurring any forfeiture of the lands so taken in mortgage; above, p. 452, *n. (f)*.

(*s*) The Mortmain Act of 1888 expressly prohibits the assurance of land to *or for the benefit of*, and the acquisition of land by *or on behalf of*, a corporation into Mortmain, except under the authority of a royal licence or statute; stat. 51 & 52 Vict. c. 42, s. 1 (1); and see stat. 15 Ric. II. c. 5, repealed by the Act of 1888; Shep. Touch. 509; 1 Sand. Uses, 339, note (*e*), 4th ed.; Lewin on Trusts, 40, 85, 6th ed.

hold lands without any restriction; others are allowed to hold lands not exceeding a certain annual value. And in other cases the alienation of land, or of a limited quantity of land, into mortmain is permitted for particular purposes, which are charitable or for the public use or benefit (*t*). The most important statutory exception to the general law prohibiting a corporation from retaining land is that of joint-stock companies incorporated under the Companies Act, 1862 (*u*), or the Companies (Consolidation) Act, 1908 (*x*). These Acts have expressly empowered every such company to hold lands (*y*): but provided that a company formed for the purpose of promoting art, science, religion, charity or any other like object, not involving the acquisition of gain by the company or by its individual members, shall not, without the sanction of the Board of Trade, hold more than two acres of land (*z*).

Companies incorporated under the Companies Acts, 1862 or 1908.

It may be noted here, with respect to the assurance of land to a corporation, that under the old doctrine of uses a corporation, having no conscience, could not stand seised of land to another person's use (*a*). It follows that, where a freehold estate is conveyed to a corporation to the use of or upon trust for another, the use will not be executed by the Statute of Uses (*b*), but the legal estate will remain in the corporation (*c*). As, however, a trust may be enforced against a corporation under the modern rules of equity (*d*), the corpora-

Corporation cannot stand seised to another's use, but may hold on trust.

(*t*) See Index to Statutes, Mortmain, 2, 3; Shelford on Mortmain, 27, 42 *sq.*; Tudor's Charitable Trusts, 470 *sq.*, 4th ed.; above, p. 452, nn. (*d*, *f*).

(*u*) Stat. 25 & 26 Vict. c. 89.

(*x*) Stat. 8 Edw. VII. c. 69.

(*y*) Stat. 8 Edw. VII. c. 69, s. 16 (2), replacing 25 & 26 Vict. c. 89, s. 18.

(*z*) Stat. 8 Edw. VII. c. 69, s. 19, replacing 25 & 26 Vict. c. 89, s. 20. These enactments

also authorised the Board of Trade, by licence to empower any such company to hold lands in such quantities and subject to such conditions as the Board think fit.

(*a*) 1 Rep. 122a; 1 Sand. Uses, 59, 4th ed.

(*b*) Stat. 27 Hen. VIII. c. 10.

(*c*) Sugd. n. to Gilb. Uses, 7, 8, 3rd ed.

(*d*) Lewin on Trusts, 30, 6th and 10th ed; *Re Thompson's Settlement Trusts*, 1905, 1 Ch. 229, 232.

Gifts to a corporation and another jointly. tion will in such case hold the legal estate on trust for the other. An Act of 1899 (*e*) enables a corporation and another to acquire and hold any property in joint tenancy. Before this Act, a gift to a corporation and another person jointly made them tenants in common (*f*).

Alienation of land by corporations. With respect to the capacity of corporations to alienate their lands, the rule is, as we have seen (*g*), that every corporation existing as such *at the common law* (*h*) has as full capacity to dispose of its lands as a natural person free from disability. But corporations existing for public or charitable purposes have in many instances been restrained by statute from disposing freely of their lands. Thus ecclesiastical and eleemosynary corporations and colleges were restrained by statutes of Elizabeth and James I. from alienating their lands for more than twenty-one years or three lives (*i*); and the alienation of the estates of ecclesiastical corporations and colleges is now regulated by many statutes (*k*). So also the alienation of Crown lands is now controlled by statute (*l*). And municipal corporations subject to the provisions of the Municipal Corporations Act, 1882,

(*e*) Stat. 62 & 63 Vict. c. 20, passed 9th Aug. 1899.

(*f*) Co. Litt. 189, 190a; Bac. Abr. Joint Tenants (B); *Law Guardian, ex. Socy. v. Bank of England*, 24 Q. B. D. 406, 411.

(*g*) Above, p. 913, and n. (*h*); 1 Prest. Abst. 272, 2nd ed.; *Scarborough Corp. v. Cooper*, 1910, 1 Ch. 68, 71.

(*h*) It should be noted that one method of creating a corporation at common law is by Act of Parliament; 10 Rep. 29b; 1 Black. Comm. 473. But a distinction must be carefully drawn between corporations created by Act of Parliament with the nature and qualities of a corporation at common law and those created

by statute for particular purposes; see Bowen, L. J., *Wenlock v. River Dee Co.*, 36 Ch. D. 675, 685, n.; below, p. 947.

(*i*) See Co. Litt. 43a, 44a; *Magdalen College case*, 11 Rep. 66b; *Magdalen Hospital v. Knotts*, 4 App. Cas. 324; *Rickard v. Graham*, 1910, 1 Ch. 722, 729.

(*k*) See Index to Statutes, Colleges (2), Corporation (2), Ecclesiastical Commission (3), Lease (3); Davidson, Prec. Conv. vol. 2, pt. 1, p. 460, n., 4th ed.; 1 Key & Elph. Prec. Conv. 614, 746, 8th ed.

(*l*) See Index to Statutes, Crown Lands and Land Revenues; Wms. Real Prop. 56, n. (*l*), 21st ed.

may not alienate corporate land (except by leasing to a limited extent) without the approval of the Local Government Board (*m*).

Corporations created by statute for particular purposes stand on a different footing from corporations existing at the common law, and may not dispose of their corporate property in any manner which is extraneous to the purposes for which the corporation was created (*n*). Thus railway companies, having the usual powers under their special Act to take and use land for the purpose of the railways and works, cannot alienate their land, or any estate or interest therein, otherwise than for the purposes of the Act (*o*); excepting only such land as they may dispose of as being superfluous land under the Lands Clauses Act, 1845 (*p*), or as having

Corporations created by statute for particular purposes.

Railway companies.

(*m*) Stats. 45 & 46 Vict. c. 50, ss. 6, 108, 109, amended by 51 & 52 Vict. c. 41, s. 72 (see s. 100), and replacing 5 & 6 Will. IV. c. 76, ss. 94, 96; 6 & 7 Will. IV. c. 104, s. 2; *Davis v. Leicester Corp.*, 1894, 2 Ch. 208. Before the commencement of the Local Government Act, 1888, stat. 51 & 52 Vict. c. 41, s. 72, this approval had to be given by the Treasury. Municipal corporations may, with the approval of the Local Government Board, dispose of their corporate land in consideration of a perpetual yearly rentcharge to issue thereout; *Scarborough Corpn. v. Cooper*, 1910, 1 Ch. 68.

(*n*) *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. C. 331, 345—348; *Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 653; *A.-G. v. Great Eastern Ry. Co.*, 5 App. Cas. 473, 478, 481, 486; *Woodcock v. River Dee Co.*, 36 Ch. D. 675, 685, n., 10 App. Cas. 354, 359—363.

(*o*) *Mulliner v. Midland Ry. Co.*, 11 Ch. D. 611; *Re Metropolitan District Ry. Co. and Cosh*, 13 Ch. D. 607; *Hobbs v. Midland Ry. Co.*,

20 Ch. D. 418; *Re Gonty and Manchester, &c. Ry. Co.*, 1896, 2 Q. B. 439, 447, 449, 450. But a stranger may by adverse possession obtain a good title under the Statute of Limitations as against such a company; *Midland Ry. Co. v. Wright*, 1901, 1 Ch. 738.

(*p*) Stat. 8 & 9 Vict. c. 18, ss. 127 *sq.* Superfluous lands (*i.e.*, those not required for the purposes of the undertaking) are required to be sold within the period prescribed by the special Act, or if no period be so prescribed within ten years after the time limited by the special Act for the completion of the works; and in default thereof such lands vest at the end of that period in the owners of the lands adjoining thereto in proportion to the extent of their adjoining lands. But before being sold, such lands, unless situate in a town or built upon or used for building purposes, are required to be offered, first, to the person then entitled to the lands whence the same were originally severed, and if such person refuse to purchase them or cannot be found, then to

been taken for extraordinary purposes under the Railways Clauses Act, 1845 (*q*). On the same principle, where a company, which was incorporated for the navigation of a river by a statute silent as to any borrowing powers, and which had been empowered by a subsequent Act to borrow up to a limited amount upon mortgage of its lands, borrowed in excess of the limit and purported to charge its lands with the repayment of the money so borrowed, the charge was held to be void (*r*). So also companies incorporated under the Companies Act, 1862, or the Companies (Consolidation) Act, 1908 (*s*), are not at liberty to dispose of their property in any manner which is inconsistent with their objects as defined in their memorandum of association (*t*). If therefore such a company convey away its land by way of sale, mortgage, or otherwise, the conveyance is valid if the transaction were expressly or impliedly authorised by its memorandum of association (*u*): but if not, the assurance is void. It may be remarked that a trading company is by necessary implication empowered to raise money by the sale, mortgage or pledge of its assets (*u*). It should be noted that where a statutory corporation created for particular purposes does any act, which is void as being *ultra vires*, the act cannot be ratified or rendered valid by the assent thereto of every individual corporator or shareholder (*t*).

River navigation company.

Companies incorporated under the Companies Acts, 1862 or 1908.

Trading company generally empowered to sell, or mortgage its property.

the adjoining owner or owners. And any such right of pre-emption will cease if not accepted within six weeks. As to the sale of superfluous lands, see *London and South Western Ry. Co. v. Common*, 20 Ch. D. 562; *Re Thackeray and Young's Contract*, 40 Ch. D. 34; above, p. 204.

(*q*) Stat. 8 & 9 Vict. c. 20, s. 45; *Mulliner v. Midland Ry. Co.*, 11 Ch. D. 611, 621.

(*r*) *Wenlock v. River Dee Co.*, 10 App. Cas. 354; *Wenlock v.*

River Dee Co., 36 Ch. D. 674, 38 Ch. D. 534.

(*s*) Above, p. 945.

(*t*) *Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 653; *Wenlock v. River Dee Co.*, *ubi sup.*

(*u*) *Re Patent File Co.*, L. R. 6 Ch. 83; *General Auction, &c. Co. v. Smith*, 1891, 3 Ch. 432; *Re Kingsbury Collieries, Ltd.* and *Moore's Contract*, 1907, 2 Ch. 259; and see *Re David Payne & Co., Ltd.*, 1907, 2 Ch. 256.

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Here it may be mentioned that, if a corporation be created by statute for particular purposes with capacity to hold land and to contract debts in such manner that the land can be taken in execution to satisfy the debts, it may lawfully give a charge upon land in favour of a creditor to secure payment of a pre-existing debt, which he might otherwise have enforced by suing the corporation and taking the land in execution (*x*). We may also notice that a corporation authorised by some statute to acquire and hold land for some particular purpose may not use its land acquired under that Act for any other purpose than that contemplated by the Act (*y*), and cannot bind itself or the land so acquired by restrictive covenants inconsistent with the object of the Act (*z*).

User of corporate lands acquired under statute for particular purposes.

If lands be vested in a corporation upon any trust, its power to dispose thereof depends upon the general law regulating the alienation of property held in trust (*a*). And if a corporation hold land upon any charitable trust or for any charitable purpose, the alienation thereof is subject to the general law governing the conveyance of charity lands (*b*).

Lands held by a corporation on trust—
or for charitable purposes.

The capacity of a corporation to contract, whether with respect to its property or otherwise, is determined by the same principles exactly as regulate its capacity to dispose of its land (*c*). If it be a corporation at common law, it has, as a rule, the like capacity of contracting as is enjoyed by any natural person free

Contracts by corporations.

(*x*) *Stagg v. Medway, &c. Co.*, 1903, 1 Ch. 169.

(*y*) *A.-G. v. Pontypridd, &c. Council*, 1905, 2 Ch. 441, 452, affirmed, 1906, 2 Ch. 257.

(*z*) *Ayr Harbour Trustees v. Oswald*, 8 App. Cas. 623; *South Eastern Ry. Co. and Wyllie's Contract*, 1907, 2 Ch. 366; cf. *Stour-*

cliffe Estates Co., Ltd. v. Bournemouth Corpn., 1910, 2 Ch. 12; and see above, p. 432, n. (*ii*).

(*a*) Above, pp. 25, sq., and see pp. 564—567.

(*b*) Above, pp. 445, 459—465; *A.-G. v. National Epileptic Hospital*, 1904, 2 Ch. 252.

(*c*) Above, pp. 946—949.

from disability (*d*). If the corporation be a common law corporation controlled by statute (*e*), as in the case of ecclesiastical corporations and colleges, municipal corporations (*f*) and many charitable corporations, its capacity of contracting of course depends on the provisions of the Acts, which have curtailed or regulated its powers. And if the corporation were created by statute for particular purposes, it is enabled to enter into any contract consistent with those purposes (*g*) and not exceeding any powers expressly conferred upon it (*h*): but if the corporation purport to make any contract inconsistent with the objects of its being or in excess of its express powers, the agreement will be void (*i*). The capacity of any corporation to contract is also qualified by the general rule of law, that a corporation can only bind itself by deed under its corporate seal (*k*); so that, as a rule, the contract of a corporation must be evidenced by deed under its corporate seal, or must be made by an agent authorised under its corporate seal to contract on its behalf (*l*). To this rule, however, there are certain

Corporations
can, as a rule,
only bind
themselves by
deed.

(*d*) Above, p. 943, n. (*h*); *A.-G. v. Newcastle-upon-Tyne Corpn.*, 23 Q. B. D. 492, 495, 497, 1892, A. C. 568; *A.-G. v. Manchester Corpn.*, 1906, 1 Ch. 643, 651. And in the case of a corporation created by Royal Charter, even acts expressly prohibited by the Charter are not invalid; *British South Africa Co. v. De Beers, &c., Ltd.*, 1910, 1 Ch. 354, 374—376, affd. 1910, 2 Ch. 502; but see 26 L. Q. R. 320. Corporations have the same power to compromise claims as a natural person has; *Holsworthy Urban Council v. Holsworthy Rural Council*, 1907, 2 Ch. 62, 73.

(*e*) Above, p. 946.

(*f*) See *A.-G. v. Manchester Corpn.*, 1906, 1 Ch. 643, 651; *A.-G. v. De Winton*, 1906, 2 Ch. 106.

(*g*) See *General Auction, &c. Co.*

v. Smith, 1891, 3 Ch. 432; *Stagg v. Medway, &c. Co.*, 1903, 1 Ch. 169.

(*h*) *Wenlock v. River Dee Co.*, 10 App. Cas. 354.

(*i*) Above, p. 948, nn. (*r*), (*t*); *Corbett v. South Eastern, &c. Committee*, 1906, 2 Ch. 12, 20; *A.-G. v. Mersey Railway Co.*, 1907, A. C. 415; *A.-G. v. West Gloucestershire Water Co.*, 1909, 2 Ch. 338, 340.

(*k*) Bac. Abr. Corporations (E, 3); 1 Black. Comm. 475.

(*l*) *Ludlow Corpn. v. Charlton*, 6 M. & W. 815; *Kidderminster Corpn. v. Hardwick*, L. R. 9 Ex. 13; *Oxford Corpn. v. Crow*, 1893, 3 Ch. 535. It appears that in general, as in the case of deeds executed by natural persons, any seal will do; Bract. p. 38a; Y. B. 11 Edw. IV. 4, pl. 7; 21 Edw. IV. 81, pl. 30; 10 Rep.

exceptions, both at common law and by statute. The common law exceptions appear to stand on the ground of the necessity of the case, or of convenience amounting to necessity (*n*). Thus of old time an exception was allowed in matters of small importance constantly occurring, as the engagement of a domestic servant, where to require a deed would be "greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object" (*n*). And this principle has been applied of late years to such an important matter as a contract by a municipal corporation possessed of a graving dock for the admission of a ship to the dock (*o*). On a similar principle it has been established in modern times that, where a corporation has been especially created for trading purposes, it may by its agents enter into all contracts necessary for or

Exceptions

Necessary matters of daily occurrence.

Corporations created for trading purposes.

30b; Perk. ss. 130—134; Vin. Abr. Fruits (H); Shep. Touch. 57; *Bull v. Dunsterville*, 4 T. R. 313; *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1, 11, 14; Wms. Real Prop. 152, 13th and 21st ed.; Pollock on Contract, 148, 7th ed. It is submitted that the doubt expressed in Grant on Corporations, 59, is not well founded. Every limited company incorporated under the Companies Acts, 1862 or 1908, is required to have its name engraven in legible characters on its seal; and the use by any director, manager, officer or other person on behalf of the company of any seal, purporting to be a seal of the company, whereon its name is not so engraven renders him liable to a fine not exceeding 50l.; stat. 8 Edw. VII. c. 69, s. 63 (1b, 3), replacing 25 & 26 Vict. c. 89, ss. 41, 42. Like provisions are enacted with respect to societies incorporated under the Industrial and Provident Societies Act, 1893 (stat.

56 & 57 Vict. c. 39, ss. 12, 21, 66). And under the Building Societies Act, 1874, the seal of any society incorporated thereunder is required to bear the registered name thereof; stat. 37 & 38 Vict. c. 42, ss. 9, 16 (10). It is thought that in all these cases the provisions enacted do not avoid, as against the corporation, a deed executed on its behalf under a different kind of seal; see *Wright v. Horton*, 12 App. Cas. 371, 377, 380, 384; *H. E. Randall Ltd. v. British and American Shoe Co.*, 1902, 2 Ch. 354, 358; Pollock on Contract, 148, 7th ed.

(*m*) *Church v. Imperial Gas, &c. Co.*, 6 A. & E. 846, 861; and see *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.

(*n*) Bac. Abr. Corporations (E, 3); Vin. Abr. Corporations (K); *Ladbroke Corpn. v. Charlton*, 6 M. & W. 815, 821; and see *R. v. Bigg*, 3 P. W. 419, 423—427, 438.

(*o*) *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.

Corporations specially created for particular purposes.

Statutory exceptions.

Companies regulated by the Companies Clauses Act, 1845.

incidental to carrying on its trade in the same manner as a natural person may; and it will be bound by such contracts, although neither the agreement itself nor the agent's authority be evidenced by deed (*p*). And the weight of authority is in favour of the opinion that the principle of this exception is not confined to the case of trading corporations, and that any corporation specially created for particular, though not for trading purposes, may make contracts necessary for effecting those purposes without seal (*q*). But no more has been actually decided than that such a corporation is bound by contracts of this kind, made without seal, where the contract has been *executed* in its favour (*r*). And this exception does not apply in cases where a corporation is prohibited by statute from making a contract otherwise than by deed (*s*). The statutory exceptions arise where a corporation is authorised by Act of Parliament to contract without deed. Of these the most important relate to contracts proveable, as between natural persons, by signed writing or word of mouth only, and made by companies established by special Act of Parliament incorporating the Companies Clauses Act, 1845 (*t*), or companies incorporated under

(*p*) *Beverley v. Lincoln Gas, &c. Co.*, 6 A. & E. 829; *Church v. Imperial Gas, &c. Co.*, ib. 846, 861; *Ludlow v. Charlton*, 6 M. & W. 815, 821; *Henderson v. Australian, &c. Navigation Co.*, 5 E. & B. 409; *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463, 4 C. P. 617.

(*q*) *Clarke v. Cuckfield Union*, 21 L. J. Q. B. 349; *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620; *Louford v. Billericay, &c. Council*, 1903, 1 K. B. 772, 784—787. See Pollock on Contract, 152, 157, 7th ed.

(*r*) See cases cited in previous note. See Adler on Corporations, 84—98.

(*s*) *Hunt v. Wimbledon Local*

Board, 4 C. P. D. 48; *Young v. Leamington Corpn.*, 8 App. Cas. 517.

(*t*) Stat. 8 & 9 Vict. c. 16. By ss. 90, 95, the powers of contracting enjoyed by such companies may be exercised by the directors, or by a committee of them entrusted with the exercise of such powers. And by s. 97, the power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised—(1) with respect to any contract which, if made between private persons, would be by law required to be in writing and under seal, by

the Companies Act, 1862 (*u*) or the Companies (Consolidation) Act, 1908 (*x*).

Companies incorporated under the Companies Acts, 1862 or 1908.

It follows from these principles that a contract by a corporation for the sale or purchase of land must, as a rule, be made under its corporate seal (*y*), or under the hand of its agent authorised under the corporate seal (*y*) to contract on its behalf (*z*). And where the corporate seal (*y*) is affixed to the written memorandum of the contract, that is equivalent to the signature thereof required by the Statute of Frauds (*a*). It appears that, where the objects of a corporation created for trading purposes include the sale or purchase of land, contracts for these purposes may be made on its behalf without seal (*b*): but it should be noted that trading purposes

Contract by a corporation for sale or purchase of land.

Trading corporations.

such committee or the directors in writing under the common seal of the company: (2) with respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, by such committee or the directors in writing signed by such committee or any two of them, or any two of the directors; and (3) with respect to any contract which, if made between private persons, would by law be valid although made by parol only and not reduced into writing, by such committee or the directors by parol only, without writing. And contracts so made on behalf of the company may be varied or discharged in the same manner in which they were made.

(*u*) Stat. 25 & 26 Vict. c. 89.

(*x*) Stat. 8 Edw. VII. c. 69. Under s. 76 of this Act, replacing s. 37 of the Companies Act, 1867 (stat. 30 & 31 Vict. c. 131), contracts on behalf of any company so incorporated may be made as follows:—(1) Any contract which, if made between private persons, would be by law required to be in writing, and if

made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company; (2) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied; and (3) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied. And any contract so made on behalf of the company may be varied or discharged in the same manner in which it was made.

(*y*) See above, p. 950, n. (f).

(*z*) *Kidderminster Corpn. v. Hardwick*, L. R. 9 Ex. 13; *Oxford Corpn. v. Crow*, 1853, 5 Ch. 535; Sug. V. & P. 145; 1 Dart, V. & P. 189, 5th ed.; 217, 6th ed.

(*a*) *Doe v. Hoag*, 1 B. & T. N. R. 306; Sug. V. & P. 730.

(*b*) Above, p. 952, and n. (*p*).

Corporations
created for
particular
purposes.

Companies.

Contracts not
binding
corporations
at law are
not enforce-
able in equity.
Doctrine of
part perform-
ance as affect-
ing a corpora-
tion.

do not, in general, include the sale or purchase of land; and it is thought that, unless traffic in land were comprehended in the objects of the corporation, the case would be governed by the general rule (*e*). In the case of an *executory* contract for the sale or purchase of land to be made with a corporation specially created for particular objects, but not for trading, it would not be safe, in the present state of the authorities, to rely upon a written memorandum not sealed on behalf of the corporation, or signed by an agent not authorised under its corporate seal, even where the objects of incorporation include the sale or purchase of land (*d*). Contracts for the sale or purchase of land by companies regulated by the Companies Clauses Act, 1845, or incorporated under the Companies Acts, 1862 or 1908, may be made in the forms authorised by statute with regard to such companies respectively (*e*); and it is not necessary that the contract should be executed under the corporate seal, or that the company's agent to sign the memorandum should be authorised under that seal (*f*).

Where a contract purporting to have been made on behalf of a corporation is void at law for want of a deed, the agreement is not enforceable in equity on the ground that the corporation has had the benefit of it (*g*). But a corporation may be affected by the equities arising from the part performance of a parol agreement for the sale or letting of land (*h*). And this doctrine is applicable, not only in all cases where the corporation

(*c*) See above, pp. 468—470.

(*d*) See above, p. 952.

(*e*) Above, pp. 952, n. (*t*), 953, n. (*v*).

(*f*) *Beer v. London and Paris Hotel Co.*, L. R. 20 Eq. 412; *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314.

(*g*) *Kirk v. Bromley Union*, 2 Ph. 640; *Crampton v. Varna Ry.*

Co., L. R. 7 Ch. 562, 568; *Hunt v. Wimbledon Local Board*, 3 C. P. D. 208, 214, 4 C. P. D. 48.

(*h*) Above, p. 13; *Wilson v. West Hartlepool Ry. Co.*, 34 Beav. 187, 2 De G. J. & S. 475, 492, 493, as to which see *Hunt v. Wimbledon Local Board*, 4 C. P. D. 48, 61, 62.

would have been bound by the alleged contract, if put into writing and signed by its agent (*i*), but also as against a corporation having the full powers of a corporation at common law (*k*) but being subject to the common law rule (*l*) requiring its contracts to be evidenced by deed (*m*). It is thought, however, that the doctrine of part performance cannot be invoked so as to bind a corporation to the specific performance of any agreement which is outside its powers (*n*), or which it is by statute *prohibited* from making otherwise than by deed (*o*). A corporation, as well as a natural person, is subject to the rule of estoppel, both at law and in equity, and may be so precluded from asserting the untruth of a statement made under its corporate seal, or of a representation made within the general scope of their authority by the words or conduct of those who are the proper persons to manage its affairs (*p*). A corporation may also be affected, owing to the conduct of such persons, by the like equity as arises against a natural person, who having good right to eject another from his land, lies by without asserting his title and knowingly suffers the other to remain in possession and lay out money on buildings or improvements (*q*). It is thought that, as in the case of the

Estoppel as
against a
corporation.

(*i*) Above, pp. 951, 952.

(*k*) Above, pp. 943, 950.

(*l*) Above, p. 950.

(*m*) *Crook v. Seaford Corpn.*, L. R. 10 Eq. 678, 6 Ch. 551; *Kelly, C. B., Kidderminster Corpn. v. Hardwick*, L. R. 9 Ex. 13, 18; *Melbourne Banking Corpn. v. Brougham*, 4 App. Cas. 156, 169; *Fry, Sp. Perf.* §§ 491, 648, 3rd ed.; *Dart, V. & P.* 236, 1030, 5th ed.; see also *Doe v. Tanieres*, 12 Q. B. 998, 1013.

(*n*) Above, p. 950.

(*o*) See cases cited above, p. 952, n. (*s*); *Fry, Sp. Perf.* § 491, 3rd ed.; *Pollock on Contract*, 133, 7th ed.

(*p*) *Re Bahia and San Francisco*

Ry. Co., L. R. 3 Q. B. 584; *Webb v. Herne Bay Commrs.*, L. R. 5 Q. B. 642; *Burkinshaw v. Nicolls*, 3 App. Cas. 1004; *Shaw v. Port Philip, &c. Co.*, 13 Q. B. D. 103; *Balkis Co. v. Tomkinson*, 1893, A. C. 396; and see *George Whitechurch, Ltd. v. Carmagh*, 1902, A. C. 117; *Ruben v. Great Fingall Consolidated, Ltd.*, 1904, 2 K. B. 712, 1906, A. C. 439.

(*q*) *Oxford's case*, 1 Ch. Rep. 1; *Crook v. Seaford Corpn.*, L. R. 6 Ch. 551, 554; *Crampton v. Varna Ry. Co.*, L. R. 7 Ch. 562, 568; *Hunt v. Wimbledon Local Board*, 4 C. P. D. 48, 62; and see 2 *White & Tudor*, L. C. Eq. 625, 6th ed.

equities arising from part performance, this equity cannot be asserted against a corporation so as to compel it to perform *specifically* any act in excess of its powers (*r*). But under this head of equity a corporation may be ordered to pay *compensation* to the aggrieved person, notwithstanding that it be disabled from fulfilling his expectations by confirming him in his possession (*s*).

Misrepresentation by the agent of a corporation.

Liability of a corporation in an action of deceit for its agent's fraudulent misrepresentation.

Where a contract made with a corporation for the sale or purchase of land is induced by the misrepresentation of the corporation's agent, the rights of the party misled to rescind the contract or to affirm it and claim compensation for his loss are the same as if the agent's principal had been a natural person, who was himself innocent of fraud (*t*). A corporation, as well as a natural person innocent of fraudulent intent (*u*), may be made liable in an action of deceit for a false representation knowingly or recklessly made by its agent within the general scope of his authority (*x*), but not for a false representation fraudulently made by the agent outside the scope of his authority (*y*) or for his own private purposes (*z*). If on a sale or purchase of land

(*r*) See note (*o*) above, p. 955.

(*s*) *Magdalen College case*, 11 Rep. 66b; *Oxford's case*, 1 Ch. Rep. 1, 6; and see *Balkis Co. v. Tomkinson*, 1893, A. C. 396, 407; *Ruben v. Great Fingall Consolidated, Ltd.*, 1904, 2 K. B. 712; 1906, A. C. 439.

(*t*) Above, p. 820 and n. (*t*); and cases cited in note (*x*), below.

(*u*) Above, pp. 823-825.

(*x*) *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Swire v. Francis*, 3 App. Cas. 106; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317; *Citizens' Life Assurance Co. v. Brown*, 1904, A. C. 423, 426, 428; *S. Pearson & Son, Ltd. v. Dublin Corpn.*, 1907, A. C. 351; *Kettlewell v. Refuge Assurance Co.*, 1908,

1 K. B. 545; 1909, A. C. 243. See *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145, 166, 167; Pollock on Torts, 293, 5th ed.

(*y*) See *Barnett v. South London Tramways Co.*, 18 Q. B. D. 815; *George Whitechurch, Ltd. v. Cavanagh*, 1902, A. C. 117, where the decision was that a limited company is not estopped from denying the truth of a false statement fraudulently made by its agent outside the scope of his authority; *Ruben v. Great Fingall Consolidated, Ltd.*, 1904, 2 K. B. 712; 1906, A. C. 439, above, p. 955.

(*z*) *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. D. 714; and see *Ruben v. Great Fingall Consolidated, Ltd.*, 1904, 2 K. B. 712; 1906, A. C. 439.

by a corporation, any misrepresentation, whether innocent or fraudulent, be made by the other party to the contract or his agent, the corporation has exactly the same rights as a natural person would have in similar circumstances (*a*).

Misrepresentation made to a corporation.

It will be seen from the above (*b*) statement of the law relating to corporations that, whenever a sale, mortgage or other assurance of land to, in trust for or by a corporation forms any part of the title, which a conveyancer is investigating on behalf of an intending purchaser or mortgagee, he must direct his attention to the following points:—In the first place, he must satisfy himself that there is, or was at the date of the assurance, such a corporation as stated in the abstract; and for this purpose he should require evidence of the incorporation, unless the existence of the corporation be sufficiently notorious to enable him to dispense with proof (*c*). Then he must ascertain whether the corporation were empowered by license in mortmain or otherwise to hold land (*d*); and if the corporation were only invested with a limited power of holding lands (*e*), he must require evidence that in holding the land in question it did not exceed its powers. With regard to the assurance of land by a corporation, it must be considered whether the assurator were a corporation at common law and unrestricted by statute, a corporation at common law but controlled by statute, or a corporation created by or under some Act of Parliament for particular purposes (*f*). In the case of a lay corporation at common law (*g*), it appears that, if it were created by royal charter with power to hold lands, the power of alienation is incident

Points to be noted where an assurance to or by a corporation forms part of a title.

Restriction on alienation by a corporation expressed in a royal charter—

(*a*) Pollock on Contract, 120, 7th ed.

(*b*) Pp. 943 *sq.*

(*c*) See *Leeds Institute, &c. v. Leeds City Council*, 1909, 1 Ch. 500.

(*d*) Above, p. 944.

(*e*) Above, pp. 944, 945.

(*f*) Above, pp. 947—949.

(*g*) Above, pp. 943, 946.

or in an Act
of Parliament.

to its ownership, and any clause in the charter purporting to restrict this power is merely declaratory of the King's desire, and of no effect in law (*h*). But where a corporation is created by Act of Parliament, any restriction thereby placed upon its powers of alienation is perfectly valid, notwithstanding that the restriction would be void as repugnant to ownership or as contravening the rule against perpetuities if annexed to a conveyance of land made between natural persons (*i*), and although the corporation be in other respects a corporation at common law (*k*). If the corporation in question be a common law corporation controlled by statute, as ecclesiastical and municipal corporations are, or be a corporation created by or under the authority of an Act of Parliament for particular purposes, such as a railway company incorporated by special Act of Parliament or a company incorporated under the Companies Act, 1862, or the Companies (Consolidation) Act, 1908, then the conveyancer must satisfy himself that the assurance was not outside the corporation's powers (*l*). If this point is to be determined by the construction of some public statute, he must of course obtain a copy of it for himself (*m*): but if the corporation were created by private Act of Parliament or under the Companies Acts, he should require the opposite party to furnish him with a copy of the Act or of the memorandum and articles of association of the company, as the case may be, in evidence of the powers which the corporation may lawfully exercise (*n*). If the abstracted assurance were not

(*h*) *Sutton's Hospital case*, 10 Rep. 1, 11, 30b; above, p. 950, n. (*d*).

(*i*) See *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, 1900, 2 Ch. 352, 1901, 2 Ch. 37.

(*k*) Above, p. 946 and n. (*h*).

(*l*) Above, pp. 946—949.

(*m*) See above, p. 146.

(*n*) It is thought that these

documents would be evidence in proof of the abstract, and not part of the abstract itself; so that the purchaser would have to pay the expense of producing them, if not in the vendor's possession; see above, pp. 33, 45, 105, 106, and n. (*g*), 116, 121, 136.

beyond the corporation's powers, the conveyancer must then consider whether the same purports to have been executed in such manner as would bind the corporation. For this purpose he must ascertain whether by the constitution of the corporation, as contained in the charter or statute of incorporation, or in the case of a company, in the deed of settlement (*o*) or the memorandum and articles of association (*p*), any particular formalities are necessary to the validity of a corporate act or are required to be observed in affixing the corporate seal; and if they be, he must see that the assurance purports to have been executed in compliance therewith (*q*).

Execution by a corporation of an assurance alienating corporate property.

According to the general law, the resolution of a majority of the corporators present at a duly convened meeting of the corporation is necessary to enable the corporation to perform a corporate act: and it appears that the corporate seal ought to be affixed at a corporate meeting to any deed so resolved to be executed (*r*): but no other formalities are prescribed for the sealing of a corporate deed (*s*). Where a corporation is governed by the general law alone, and an assurance by it has the corporate seal affixed thereto, and there is an attestation clause in a general form (*t*) to the effect that the corporation has affixed its common seal thereto, then it appears that, according to the regular practice of conveyancers on a sale (*u*), it will be presumed that the corporate seal was duly and properly affixed thereto,

What is necessary to effect a corporate act by a common law corporation.

(*o*) This refers to companies incorporated under the Joint Stock Companies Acts of 1844, stat. 7 & 8 Vict. cc. 110, 113, repealed by the Companies Act, 1862; see Wms. Pers. Prop. 298, 301, 302, 16th ed.

(*p*) Above, p. 948.

(*q*) See *D'Arcy v. Tamar*, 32 Ry. Ct., L. R. 2 Ex. 158; and

cases cited below, p. 960, n. (*x*).

(*r*) Bac. Abr. Corporations (E, 7); *Mayor, &c. of the Staple v. Bank of England*, 21 Q. B. D. 160, 165, 166.

(*s*) *Re Burned's Banking Co.*, L. R. 3 Ch. 105, 116.

(*t*) Cf. above, pp. 298, 299, and n. (*c*).

(*u*) Above, p. 117.

and evidence will not be required that the seal was affixed at a duly constituted meeting of the corporators or in pursuance of a resolution passed by a majority of those assembled at such a meeting. For where one claims as a purchaser for value and in good faith, without notice of any irregularity, under a deed of conveyance or contract executed under the common seal of a corporation, and the transaction effected by the deed is within the powers of the corporation, and it appears upon the face of the deed that the particular formalities (if any) prescribed by the constitution of the corporation for affixing the corporate seal have been duly observed, he may infer and need not ask for proof that all acts of internal management necessary to bind the corporation to the transaction in question (such as the proper convening of a meeting or the passing of a resolution by the requisite majority) have been duly performed; and the corporation will be estopped from alleging, as against him, that in consequence of some such irregularity of internal management it is not bound by the deed (*x*). If, however, anything should appear in the body or the attestation clause of the deed, which is inconsistent with or raises a doubt concerning the rightful execution thereof as a corporate act (*y*), an explanation should be asked for, and if necessary, strict proof that the deed was duly executed should be required (*z*). Thus it is thought that, where the deed of a corporation is executed with a general attestation clause (*a*) but under a plain seal and not the

(*x*) *Clarke v. Imperial Gas, &c. Co.*, 4 B. & Ad. 313, 325, 326; *Royal British Bank v. Turquand*, 6 E. & B. 327, 332; *Agar v. Athanasium, &c. Socy.*, 3 C. B. N. S. 725; *Re Athanasium, &c. Socy.*, *Expte. Eagle, &c. Co.*, 4 K. & J. 549, 561; *Re County Life Assurance Co.*, 1 L. R. 5 Ch. 288; *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869, 893, 894; *County of*

Gloucester Bank v. Rudry, &c. Co., 1895, 1 Ch. 629; *London Freehold, &c. Co. v. Suffolk*, 1897, 2 Ch. 608; *Re Bank of Syria*, 1900, 2 Ch. 272, 278, 1901, 1 Ch. 115, 121; *Duck v. Tower Galvanizing Co.*, 1901, 2 K. B. 314.

(*y*) Above, p. 959.

(*z*) See above, pp. 117—119.

(*a*) Above, p. 959.

corporate seal (*b*), that circumstance would justify the conveyancer in demanding proof of its execution.

Where the *constitution* (*c*) of a corporation requires that some special formality shall be observed in affixing the corporate seal to any instrument, then no instrument sealed with the corporate seal can be accepted by the conveyancer advising on title as a proper corporate act, unless it appear on the face of the deed that every such formality has been complied with. Thus if the deed of settlement or articles of association of a company provide that the corporate seal must be affixed to any instrument intended to bind the company in the presence of two directors at least, who shall sign the instrument, and that the secretary shall countersign the same (*d*), a deed not executed in conformity with these requirements is of no effect in law to bind the company; and objection must be taken to it accordingly. If, however, it appear from the attestation clause and otherwise on the face of the instrument that it has been sealed and signed in accordance with these conditions, it may be accepted as regularly executed, and inquiry need not be made nor proof required whether the persons who have signed the deed as directors and secretary were duly appointed to their offices (*e*).

Where some formality is required by the constitution of the corporation.

In the case of building societies incorporated under the Building Societies Act, 1874 (*f*), the constitution of the corporation is contained partly in the Building Societies Acts (*f*) and partly in the registered rules, which must contain provision for the device, custody

Incorporated building societies.

(*b*) Above, p. 950, n. (*l*).

(*c*) See above, p. 958.

(*d*) See Palmer, *Company Precedents*, i. 689, 782, 10th ed.

(*e*) See cases cited above,

p. 960, n. (*x*).

(*f*) Stat. 37 & 38 Vict. c. 42, amended by 38 & 39 Vict. c. 9; 40 & 41 Vict. c. 63; 47 & 48 Vict. c. 41; and 57 & 58 Vict. c. 47.

Industrial
and provident
societies.

and use of the seal of the society (*g*). And the seal must in all cases bear the registered name of the society (*g*). Conveyancers advising on title must therefore see that any assurance by such a society purports to have been executed as required by the rules. Societies incorporated under the Industrial and Provident Societies Acts are regulated by similar provisions (*h*).

Forgery of
the deed of a
corporation.

It must not be forgotten that the deed of a corporation may be forged, even though it bear the impression of the real corporate seal, and notwithstanding that such seal were affixed thereto (but without authority) by the person entrusted with its custody (*i*). An instrument so forged has no more effect than a deed forged in the name of a natural person (*k*).

Dissolution of
a corporation.

It is asserted in Coke upon Littleton (*l*) that, upon the dissolution of a corporation, any lands, of which it was seised in fee simple, do not escheat to the lord of the fee, but revert to the grantor or his representatives; for that on the grant of lands to a corporation (*m*) there is a condition implied in law that, if the corporation cease to exist, the grantor or his heirs may re-enter. And this proposition has been accepted without question by many eminent judges, text-writers and conveyancers (*n*). Mr. Hargrave, however, in a note to his

(*g*) Stat. 37 & 38 Vict. c. 42, s. 16 (10). See *Encyclopædia of Forms*, iii. 4, 9, 10, 19.

(*h*) See stat. 56 & 57 Vict. c. 39, ss. 10, 21, 36, 37, and Sched. II. No. 11, consolidating the provisions of repealed Acts of 1862, 1867, 1871, and 1876.

(*i*) *Bank of Ireland v. Trustees of Evans' Charities*, 5 H. L. C. 389; *Corpn. of the Staple v. Bank of England*, 21 Q. B. D. 160; *Ruben v. Great Fingall Consolidated, Ltd.*, 1904, 2 K. B. 712; 1906, A. C. 439.

(*k*) Above, p. 838.

(*l*) Co. Litt. 13b.

(*m*) It may be noted that on the grant of land to a corporation aggregate, they take an estate in fee simple although the land be not limited to them and their successors, or since the end of the year 1881 to them in fee simple: Co. Litt. 94b.

(*n*) *Hardwicke, C., A.-G. v. Gower*, 9 Mod. 224, 226; *Mansfield, C. J., Burgess v. Wheate*, 1 W. Bl. 123, 165; *Black. Comm.* i. 484, ii. 256; 1 *Prest. Abst.*

edition of Coke upon Littleton (*o*), pointed out that there are important authorities (*p*) to the effect that lands held in fee by a corporation *do* escheat, upon its dissolution, in the same manner exactly as lands held by a natural person dying intestate and without heirs; and he himself obviously doubted the accuracy of Lord Coke's statement. And Professor Gray of Harvard, in his learned and original treatise upon the Rule against Perpetuities (*q*), has entered into a critical examination of the point in dispute, and has shown that the rule alleged by Lord Coke rests on no certain warrant of judicial decision, but the weight of authority is in favour of the conclusion that in the event above mentioned the land *shall* escheat. The writer submits that this is the better opinion (*r*). In a recent case, however,

See Challis on Real Property notes on it 439, 467 3rd ed.

272, 2nd ed.: Lewis on Perpetuities, 621; *Celchester Corpn. v. Brooke*, 7 Q. B. 339, 384; Grant on Corporations, 303; Challis, R. P. 199, 2nd ed.; Darling, J., *Hastings Corpn. v. Letton*, 1908, 1 K. B. 378, 384.

(*o*) Co. Litt. 13a, n. (2).

(*p*) *Johnson v. Norway*, Winch, 37; *Southwell v. Wade*, 1 Rolle, Abr. 816 (Escheat, A, 3); S. C., Poph. 91.

(*q*) (Boston, 1886), §§ 44—51; pp. 32—37; 42—48, 2nd ed.

(*r*) Lord Coke's doctrine involves the acceptance of more than one anomaly, which would disappear if it were established that the devolution of land vested in a corporation becoming extinct by dissolution is governed by the law of escheat. Thus, to maintain this doctrine, it has to be admitted, in the case of freeholds, that a corporation does not acquire a fee simple absolute, but takes a determinable fee subject to a possibility of reverter to the grantor or his heirs; see Mansfield, C. J., 1 W. Black. 165; 2 Black Comm. 265; and it seems to be the better opinion that since the statute of *Quia Emptores*, 18 Edw. I. c. 1, such an estate can no longer exist in the case of a natural person; see Third Report of Real Property Commrs., p. 36; Gray on Perpetuities, §§ 13, 31—37; Challis on Real Property, Chap. XVII. and Appx. iv., 2nd ed. But as it has never been doubted that a corporation may alien its land for an absolute estate in fee simple, or such lesser estate as was granted to it, free from all possibility of reverter to the grantor or his heirs, this fact has to be reconciled with Lord Coke's doctrine by asserting that a corporation has an absolute fee simple for the purposes of alienation, though it takes only a determinable fee for the purposes of enjoyment; 1 Prest. Abst. 272, 2nd ed. Such a theory is entirely at variance with the general principle of English law that a man can give no better title than he has. The matter is, however, explicable if it be remembered that the doctrine, that a gift of land to a corporation is subject to a condition that the land shall revert to the grantor or his heirs if the corporation cease to exist, is properly referable only to the time before the statute of *Quia Emptores* when such a

*Hastings
Corpn. v.
Letton.*

Lord Coke's doctrine was again asserted; it was held that a lease for a term of years granted to a corporation is subject to the implied condition that the land shall revert to the grantor, if the corporation shall cease to exist; and the Court decided that upon the dissolution of the corporation the term did not vest in the Crown as *bona vacantia*, but the reversion was accelerated and the term became extinct (s). But it is respectfully submitted that this decision is incorrect (t). It

gift might be made by way of subinfeudation; see 2 Black. Comm. 256, 257. In those early times such a gift was strictly analogous to a gift of land to a natural person and his heirs, which would escheat to the donor or his heirs on failure of the heirs of the donee. But the effect of the changes in the law, which culminated in the statute of *Quia Emptores*, was that the donee of land to him and his heirs acquired a fee, which would determine or escheat on failure of *his* heirs, provided it were not assigned, but would, if assigned, endure as long as there were heirs of the assignee; see Wms. Real Prop., 38, 39, 56, 70-74, 21st ed. It is submitted that an estate in fee simple granted to a corporation should, since the statute of *Quia Emptores*, be treated as being subject to the same law; see Gray, Rule against Perpetuities, §§ 44-51. And if the statute of *Quia Emptores* now prevents the existence of a possibility of reverter on the cesser of a determinable fee granted to a natural person, there seems to be no good reason why it should not have the same effect in the case of an estate in fee simple granted to a corporation. It may also be noted that, if on a grant of land to a corporation in fee it were attempted to provide by way of shifting use that if the corporation should be dissolved, the land should revert to the grantor, his heirs or assigns, the proviso would apparently be void for remoteness; see above, pp. 677-679.

(s) *Hastings Corpn. v. Letton*, Darling and Phillimore, JJ., 1908, 1 K. B. 378.

(t) Darling, J., simply rested his judgment on Lord Coke's doctrine as stated in 1 Black. Comm. 484. Phillimore, J., expressed the opinion that a term of years granted to a corporation must cease to exist when the corporate *persona* is extinct, because there is then no tenant in being to continue to hold the land and (as the Court held) the term does not vest in the Crown: but he attributed this result to Lord Coke's doctrine. Apparently it did not occur to the learned judges to consider that a corporation may take a term by assignment from the lessee, in which case Lord Coke's doctrine would require that, upon the dissolution of the corporation, the term should not be extinguished, but should revert to the assignor. It is respectfully submitted however that, if (as the writer contends) Lord Coke's doctrine is unsound in principle and really opposed to the greater weight of authority (see above, p. 963, and notes (p), (q), (r), then the fact, that on the dissolution of a corporation tenant for years there may be no person entitled to hold the land in right of the term, is no good reason why the reversion should be accelerated and the lessor entitled to re-enter. The lessor has parted with all right to the possession of the land for the whole term granted, save so far as he

has been decided that contracts made by or with a corporation are discharged upon its dissolution because there is no longer any person bound by or capable of enforcing them (*u*). On this principle, debts due from or to a corporation appear to be discharged when the corporation is dissolved (*x*). But the Crown has a title to take as *bona vacantia* all chattels which belonged to a dissolved corporation for its own use and have not become extinct by the fact of its dissolution, and this title extends to all chattels, whether real or personal and whether in possession or in action, which were vested in some other person in trust for the corporation's own use (*y*). Where, however, any land or chose in action is vested in a corporation as trustee and the corporation is dissolved, it has been considered that the Court has jurisdiction under the Trustee Act, 1893 (*z*), to appoint a new trustee and make an order vesting the trust property in him; and such an order has been made with respect

Property
vested in a
corporation
as trustee.

may by express proviso be entitled to re-enter for non-payment of rent or breach of covenant; and it is opposed to the principles of English law that he should have any claim (except as aforesaid) to enter on the land during the term. This principle is exemplified in the old law allowing the general occupant to take possession on the death of the grantee of an estate *pur autre vie*, and refusing both to the grantor and to the person entitled on the death of the *cestui que vie* any right of entry on the land; Co. Litt. 41 b; Wms. Real Prop. 20, 13th ed. (132, 21st ed.); also in the case of a tenant for years being ousted, when the lessor has no right to re-enter till the end of the term; see *Walter v. Yalden*, 1902, 2 K. B. 304. For these reasons it is respectfully submitted that, on the dissolution of a corporation tenant for years, the lessor cannot lawfully re-enter, but the possession of the land is vacant and the land itself without an owner for the rest of the term. If so, it is thought that the Crown has the right (if it choose) to seize the land as *bona vacantia* for the rest of the term; see note (*y*), below.

(*u*) *Popular Life Assurance Co., Ltd.*, Warrington, J., 1909, 1 Ch. 80, 84; note, however, that in that case the corporation dissolved was a trustee, at the date of its dissolution, of its beneficial contracts and choses in action, having sold all its assets to another company; and cf. the case cited in note (*b*), p. 966,

below.

(*x*) See *Re Higginson and Dean, Wright and Darling, J.J.*, 1899, 1 Q. B. 325, 330—332; Bigham, J., *Re FitzGeorge*, 1905, 1 K. B. 462, 464.

(*y*) *Re Higginson and Dean*, 1899, 1 Q. B. 325, 329.

(*z*) Stat. 56 & 57 Vict. c. 53, ss. 25 (1), 26, 35 (1).

to a term of years vested by assignment in a corporation afterwards dissolved (*a*) and as to freeholds in fee and choses in action which belonged to such a corporation (*b*). With respect to the choses in action, this last decision seems to involve the conclusion that debts due to the corporation, as a trustee, are not discharged by its dissolution, but remain existent and capable of being vested in a new trustee (*c*); though it does not appear that the possibility of the debts having been discharged (*d*) was brought to the notice of the Court. The whole subject is full of doubt, difficulty and confusion (*e*). It may be remarked that these points of law are far from academic; as companies incorporated under the Companies Acts are constantly dissolved after being wound up either voluntarily or by the Court (*f*).

Assurance of
lands belong-
ing to a
company in
liquidation.

The reader may be reminded that, when a company is wound up under the Companies (Consolidation) Act,

(*a*) *Re No. 9, Bomore Road*, J., 1909, 1 Ch. 701.

Warrington, J., 1906, 1 Ch. 359; (*c*) See *ibid.* pp. 704, 707.

see above, p. 964, n. (*t*).

(*d*) See above, p. 965.

(*b*) *Re Ruddington Land*, Parker,

(*e*) See *Pryce Jones v. Williams*, Joyce, J., 1902, 2 Ch. 517, where it was considered that a term granted to a corporation afterwards dissolved, but apparently held by it as trustee at the time of its dissolution, vested in the Crown as *bona vacantia* (a doctrine repudiated in *Hastings Corpn. v. Letton*, 1908, 1 K.B. 378, 386; above, p. 963); *Re General Accident Assce. Corpn.*, Farwell, J., 1904, 1 Ch. 147, where an order was made vesting in a trustee a mortgage term granted to a corporation afterwards dissolved and also the right to sue for the mortgage debt, the corporation having been a trustee of the mortgage, on the ground that it was a case where the trustee could not be found within sect. 26 of the Trustee Act, 1893; *Re Taylor's Agreement Trusts*, Buckley, J., 1904, 2 Ch. 737, dissenting from the decision last mentioned and expressing the opinion that the legal interest in a patent granted to a corporation and held by it as trustee vested, on its dissolution (if anywhere), in the Crown; *Re Richard Mills & Co., Ltd.*, Farwell, J., 1905, W. N. 36, following his own decision in *Re General Accident Assurance Corpn.*, *ubi. sup.*

(*f*) See stat. 8 Edw. VII. c. 69, ss. 172 (1), 195 (4), 242, replacing 25 & 26 Vict. c. 89, ss. 111, 143; 43 Vict. c. 19, s. 7;

63 & 64 Vict. c. 48, s. 26; and cases cited in notes (*u*, *x*), p. 965, (*a*, *b*, *e*), above.

1908 (replacing the Companies Acts, 1862 to 1890), either voluntarily or by the Court, the legal estate in its lands remains vested in the company, and does not devolve upon the liquidator (*g*). The liquidator has power to *sell* all the property of the company, including its lands (*h*), and he can so transfer the beneficial interest therein to any purchaser (*g*): but he is not authorised to convey the legal estate in the company's lands (*g*). If, therefore, land belonging to a company in liquidation for any legal estate or interest be sold by the liquidator, the company must duly assure the same to the purchaser, the liquidator affixing the company's seal to the deed, as he is empowered to do (*i*). A conveyance of such land by the liquidator alone would only pass the equitable estate therein (*k*). But if the company's estate or interest in the land were equitable only, the liquidator alone could effectually assure the same; for as we have seen (*l*), it is unnecessary for an intermediate trustee, who holds no legal estate and can have no lien for his expenses, to concur in a transfer of the beneficial interest.

(*g*) *Re Oriental, &c. Co.*, L. R. 9 Ch. 557, 560; *Re Metropolitan Bank and Jones*, 2 Ch. D. 366; *Re Elsworth and Tidy's Contract*, 42 Ch. D. 23, 49, 52; and cases cited in notes (*u*, *x*), p. 965, (*a*, *b*, *e*), p. 966, above.

(*h*) Stat. 8 Edw. VII. c. 69, ss. 151 (2 *a*), 186 (iv), replacing 25 & 26 Vict. c. 89, ss. 95, 133 (7), which applied only to voluntary liquidation, but was extended by 53 & 54 Vict. c. 63, s. 12 (2), to cases where the company was being wound up by the Court.

(*i*) Stat. 8 Edw. VII. c. 69, ss. 151 (2 *b*), 186 (iv), replacing 25 & 26 Vict. c. 89, ss. 95, 133 (7); Davidson, *Proc. Conv.* vol. ii. pt. i. 695, n. 4th ed.; 1 Key & Elph. *Proc. Conv.* 667 and n.,

9th ed. Where several liquidators are appointed in a voluntary liquidation, not less than two of them can act in this respect, unless otherwise determined at the time of their appointment; stat. 8 Edw. VII. c. 69, s. 186 (vii), replacing 25 & 26 Vict. c. 89, s. 133 (6); *Re Metropolitan Bank and Jones*, 2 Ch. D. 366. If more than one liquidator is appointed in a winding up by the Court, the Court is to declare whether any act required or authorised to be done by the liquidator is to be done by all or any one or more of the liquidators appointed; stat. 8 Edw. VII. c. 69, s. 149 (4).

(*k*) See cases cited in note (*g*), above.

(*l*) Above, p. 614.

Sale by company of land subject to floating security.

Upon the sale by a company of land subject to a floating security, of which the terms empower the company to dispose of its property in the course of its business until default shall be made in payment of the principal or interest secured, the purchaser is entitled to reasonable evidence that no such default has been made (*m*); and he must ascertain that no steps have been taken to enforce the security and that nothing else has occurred to make it attach definitely on the property charged (*n*).

Unincorporated societies.

Lands belonging to unincorporated societies, as are most clubs, and as were many companies formed before the passing of the Joint Stock Companies Acts of 1844 (*o*), must of course be vested at law either in all the members jointly, or in trustees for them (*p*); and they are usually vested in trustees. Where title is made by or through any assurance of such lands, the conveyancer advising thereon must ascertain, first, that the legal estate has passed or will pass as required. In this respect, if the land has been vested in trustees, his task will be the same as in the case of assurances by trustees for persons not professing to have formed themselves into a society (*q*). And if no notice of the trust should appear on the abstract, he will only have to consider the matters arising on the assurance of land by joint tenants, or the survivors of them, appearing to be beneficially entitled (*r*). If, however, notice

(*m*) *Re Horne and Hellard*, 29 Ch. D. 736; see *Driver v. Broad*, 1891, 1 Q. B. 744; *Government Stock, &c. Co., Ltd. v. Manila Ry. Co., Ltd.*, 1895, 2 Ch. 551, 563; 1897, A. C. 81.

(*n*) See *Wheatley v. Silkstone and Haigh Moor Coal Co.*, 29 Ch. D. 715; *Government Stock, &c. Co., Ltd. v. Manila Ry. Co., Ltd.*, *ubi sup.*; *Cox Moore v. Peruvian Corp., Ltd.*, 1908, 1 Ch. 604; *Evans v. Rival Granite Quarries,*

Ltd., 1910, 2 Ch. 979. As to the necessity for registration of floating charges, see above, p. 599, n. (*r*).

(*o*) Stats. 7 & 8 Vict. cc. 110, 113; see *Wms. Pers. Prop.* 298—301, 16th ed.

(*p*) *Co. Litt.* 2a, 3a; 1 *Dart, V. & P.* 20, 21, 5th ed.; 24, 25, 6th ed.; 29, 30, 7th ed.

(*q*) Above, pp. 256 *sq.*

(*r*) Above, pp. 237 *sq.*, 241—244.

of the trust for the society appear in the title-deeds or otherwise, then (unless all the members, being *sui juris*, be parties to and execute the assurance) the conveyancer must consider whether the regulations of the society lawfully enable the act of alienation of its property to be performed by some only of the members on behalf of all of them, and if so, whether such regulations have been duly observed. Thus in the case of a members' club, of which the property is vested in trustees, it may have to be considered (for example) whether the committee or a majority of the members assembled at a general meeting (as the case may be) are authorised by the constitution of the club, as contained in the rules legally binding on the members, to dispose of the club property (*s*). So in the case of a company of the older kind, not being incorporated, it may be necessary to ascertain that any regulations empowering the directors to alienate the company's property have been strictly complied with (*t*). And in the case of the alienation of land belonging to an old building society regulated by the Building Societies Act, 1836 (*u*), or a registered friendly society (*x*), the conveyancer must satisfy himself that the rules of the society (as well as the general requirements of the regulating statutes) have been observed, or that the rules contain provisions effectually relieving any purchaser from the society's trustees from the obligation of making inquiry on this point (*y*). Unincorporated Clubs. Unincorporated building societies. Friendly societies.

(*s*) See *Clay v. Rufford*, 5 De G. & S. 768, 780; *Harington v. Sendall*, 1903, 1 Ch. 921; and see an article by the writer, criticising this decision, in the *National Review* for Oct. 1903; and see further, as to club property, an article by the writer in *L. Q. R.* xix. 386.

(*t*) See *Clay v. Rufford*, 5 De G. & S. 768, 780; *Re Woods and Lewis' Contract*, 1898, 1 Ch. 133, 134. 2 Ch. 211, 214, 215.

(*u*) Stat. 6 & 7 Will. IV. c. 32; see *Encyclopædia of Forms*, iii. 3, 4. 21 *sq.*

(*x*) The law relating to friendly societies is now consolidated in the Friendly Societies Act, 1896, and the Collecting Societies and Industrial Assurance Companies Act, 1896; stats. 59 & 60 Vict. cc. 25, 26.

(*y*) See *Encyclopædia of Forms*, vi. 15 *sq.*, 38, 51.

Unincorporated societies established under statutory powers.

societies or associations owing their existence to statute, such as unincorporated building societies formed under the Act of 1836 (*z*), registered friendly societies (*a*), literary and scientific institutions established under the Literary and Scientific Institutions Act, 1854 (*b*), or trades' unions (*c*), are subject to the same law as governs corporations created by statute for particular purposes (*d*); that is to say, they may not dispose of or use the property belonging to them in their quasi-corporate capacity in any manner which is extraneous to the objects for which they were instituted (*e*).

Mortgages to building, friendly or industrial and provident societies.

Effect of receipt for mortgage money endorsed on mortgage to a building society.

Here we may notice that mortgages made to building, friendly or industrial and provident societies are subject to a special law with respect to re-vesting the estate in the mortgaged land when the charge is paid off. By the Building Societies Act of 1836 (*f*), the trustees of any building society established thereunder were empowered to endorse upon any mortgage or further charge given by any member of the society to the trustees thereof for moneys advanced by the society to any member a receipt for all moneys intended to be secured by such mortgage or further charge; which receipt should be sufficient to vacate the same and vest the estate in the property comprised in such security in the person or persons for the time being entitled to the equity of redemption, without it being necessary for the trustees to give any reconveyance of the property so mortgaged. It was decided that the effect of a receipt endorsed under this enactment is to vest the estate in

(*z*) *Blackburn Bdy. Socy. v. Cunliffe, Brooks & Co.*, 22 Ch. D. 61, 70, 9 App. Cas. 857; see above, p. 969, n. (*u*).

(*a*) See *Re Coltman*, 19 Ch. D. 61; above, p. 969, n. (*x*).

(*b*) Stat. 17 & 18 Vict. c. 112; *Re Badger*, 1905, 1 Ch. 568.

(*c*) *Amalgamated Society of Railway Servants v. Osborne*, 1910, A. C. 87, 92, 94.

(*d*) Above, pp. 950, 952.

(*e*) See cases cited above, notes *z*, *a*, *b*, *c*.

(*f*) Stat. 6 & 7 Will. IV. c. 32, s. 5.

the mortgaged property in the person then having the best right to call for a conveyance of the same; and that a person so acquiring the legal estate in the mortgaged property is entitled to the like advantages in respect thereof as if the same had been expressly conveyed to him by some one of the ordinary modes of assurance (*g*). Where therefore a member mortgaged his land to a building society, then made a second mortgage to another person and afterwards arranged with a third party to pay off the first mortgage and make a further advance, it was held that on a receipt being endorsed on the first mortgage for the moneys due thereunder the legal estate in the land thereby mortgaged vested in the third party; and further that he (having had no notice of the second mortgage) was in consequence entitled to tack his further advance to the amount expended in paying off the first mortgagee, and to have priority over the second mortgagee in respect of the whole amount owing to him (*h*). By the Building Societies Act, 1874 (*i*), when all moneys

Hosking v. Smith.

Building Societies Act, 1874.

(*g*) *Hosking v. Smith*, 13 App. Cas. 582, 585, 589, adopting on the first point the second of the two alternative constructions propounded by Cairns, C., in *Pease v. Jackson*, L. R. 3 Ch. 576, 582, but overruling on the second point that case and *Robinson v. Trevor*, 12 Q. B. D. 423.

(*h*) *Hosking v. Smith*, *ubi sup.*, overruling on the second point *Pease v. Jackson* and *Robinson v. Trevor*, *ubi sup.*

(*i*) Stat. 37 & 38 Vict. c. 42, s. 42, providing also, in cases where the mortgage or further charge has been registered under any Act for the registration or record of deeds or titles, or (being of copyholds or lands of customary tenure) has been entered on any court rolls, for the entry on production of the statutory receipt of satisfaction of the mortgage or charge and for granting

a certificate to that effect. By the Land Transfer Rules, 1903, No. 167, when all moneys intended to be secured by any mortgage or charge to or in favour of any building society, friendly society (including a branch society), or industrial and provident society have been fully paid or satisfied, an instrument of discharge in the form provided by these rules, under the seal of such society if incorporated, or under the hands and seals of the trustees for the time being of or acting in that matter for such building or friendly society, or other the proper officers thereof, if such society is not incorporated, and attested by the secretary; or under the hands and seals of two members of the committee of an industrial and provident society, if unincorporated, and attested by the secretary: shall have the

intended to be secured by any mortgage or further charge given to a society under that Act in England or Ireland have been fully paid or discharged, the society may endorse upon or annex to such mortgage or further charge a reconveyance of the mortgaged property to the then owner of the equity of redemption, or to such persons and to such uses as he may direct (*k*), or a receipt under the seal of the society, countersigned by the secretary or manager in the form specified in the Schedule to the Act; and such receipt shall vacate the mortgage or further charge or debt and vest the estate in the property therein comprised in the person for the time being entitled to the equity of redemption, without any reconveyance or re-surrender whatever. The construction placed on this enactment is exactly similar to that placed on the enactment of 1836; and it is established that the effect of the statutory receipt is to vest the estate in the person having the best right to call for it, and that a person so acquiring the legal estate obtains all the attendant advantages (*l*). Thus a person paying off a first mortgage to a building society and making a further advance, without notice of a previous second mortgage, will by virtue of the

same effect and operation in vacating the mortgage or charge, and in vesting the estate, and otherwise, as a receipt indorsed on such mortgage or charge, duly made, signed, and attested in such form and manner and by such persons as is prescribed by, and otherwise in conformity with the provisions of s. 5 of 6 & 7 Will. IV. c. 32; s. 42 of the Building Societies Act, 1874; s. 43 of the Industrial and Provident Societies Act, 1893; and s. 53 of the Friendly Societies Act, 1896, respectively.

(*l*) No particular effect is given by this enactment to the reconveyance here mentioned; and if,

on payment off of such a mortgage or further charge as above mentioned, a reconveyance is used (instead of a statutory receipt) it takes effect according to the general law; *Carlisle Banking Co. v. Thompson*, 28 Ch. D. 398. Both the statutory reconveyance and the statutory receipt are under s. 41 of the Act exempt from stamp duty; *Old Battersea, &c. Building Society v. Inland Revenue Commissioners*, 1898, 2 Q. B. 294.

(*l*) *Fourth City, &c. Building Society v. Williams*, 14 Ch. D. 140; *Sangster v. Cochrane*, 28 Ch. D. 298; *Crosbie-Hill v. Sayer*, 1908, 1 Ch. 866, 873, 874.

statutory receipt being then endorsed on the first mortgage obtain the legal estate in the mortgaged property and consequent priority over the second mortgagee both for the amount expended in paying off the first mortgage and for his further advance (*n*). Where a person, who has mortgaged his land, first to a building society and afterwards to another, pays off the first mortgage out of his own money and so obtains the statutory receipt from the society, the legal estate vests in the second mortgagee, though he be unaware of the discharge of the first mortgage (*n*). Where a mortgagor of land to a building society arranged with a bank to pay off the mortgage, and the bank advanced the money on receiving from the society all the title deeds (except the mortgage) and an undertaking to endorse the statutory receipt and from the mortgagor a memorandum of equitable charge on the land, including an undertaking to execute a legal mortgage if required, and shortly afterwards the society handed the mortgage deed with the statutory receipt endorsed to the bank, it was held that the legal estate then vested in the bank. And the mortgagor having subsequently made a mortgage to L. and then arranged with C. to pay off the bank, and C. having done so (without notice of the mortgage to L.) and having received from the bank the title deeds and the bank's memorandum of charge with a receipt endorsed for all moneys due thereunder, it was further decided that C. had then the best right to call for the legal estate (which remained vested in the bank) and was so entitled to priority over L. (*o*). The Friendly Societies Act, 1896 (*p*), and the Industrial

Crosbie-Hill
v. *Sayer*.

(*m*) *Murson v. Cox*, 14 Ch. D. 140, as confirmed by *Hosking v. Smith*, 13 App. Cas. 582; *Stangster v. Cochrane*, 28 Ch. D. 298, where the intermediate transaction was an absolute sale, not a second mortgage.

(*n*) *Fourth City, &c. Building Society v. Williams*, 14 Ch. D. 140.

(*o*) *Crosbie-Hill v. Sayer*, 1908, 1 Ch. 866.

(*p*) Stat. 59 & 60 Viet. c. 53, replacing 38 & 39 Viet. c. 60, the Friendly Societies Act, 1875.

Mortgages to friendly societies and industrial and provident societies.

and Provident Societies Act, 1893 (*g*) contain provisions similar to those of the Building Societies Act, 1874 (*r*), with respect to the vacation of mortgages to such societies by a statutory receipt endorsed thereon or annexed thereto.

Transfer of mortgage made to a building society.

Doubt has been cast on the validity of a transfer, without the mortgagor's consent, of a mortgage made to a building society by a member to secure the repayment of money lent by way of an advanced share in the society (*s*).

Vesting of property of unincorporated building or friendly societies.

All freehold and leasehold property belonging to any unincorporated building society certified under the Act of 1836 (*t*) or to any registered friendly society (*u*) vests, without any conveyance, in the trustees for the time being thereof (*x*).

s. 16 (7, 8) ; see *Carlisle Banking Co. v. Thompson*, 28 Ch. D. 398, 400.

(*g*) Stat. 56 & 57 Vict. c. 39, s. 43, replacing 39 & 40 Vict. c. 45, s. 12 (8) ; 34 & 35 Vict. c. 80, s. 3.

(*r*) Stat. 37 & 38 Vict. c. 42, s. 42 ; above, p. 972.

(*s*) *Re Rumney and Smith*, 1897, 2 Ch. 351, attributing the decision in *Ulster Permanent Bdg. Socy. v. Glenton*, 21 L. R. Ir. 124, to the fact that the mortgagor consented to the transfer.

(*t*) Stats. 6 & 7 Will. IV. c. 32, s. 1, applying 10 Geo. IV. c. 56, s. 21 : 37 & 38 Vict. c. 42, s. 7. See stats. 37 & 38 Vict. c. 42, s. 27 ; 40 & 41 Vict. c. 63, ss. 3,

45, as to the vesting of the property of such a society on its incorporation, and on the union of or the transfer of its assets by one building society with or to another.

(*u*) See stat. 59 & 60 Vict. c. 25, ss. 48—50, replacing 38 & 39 Vict. c. 60, s. 16 (3—6) ; 18 & 19 Vict. c. 63, s. 18 ; 13 & 14 Vict. c. 115, s. 13 ; 10 Geo. IV. c. 56, s. 21.

(*x*) See also stat. 56 & 57 Vict. c. 39, ss. 21, 53, as to the vesting of property held in trust for or belonging to an industrial and provident society upon its registration or on the amalgamation of two or more such societies.

CHAPTER XVII.

OF RELATIVE DISABILITY IN EQUITY.

IN the previous chapter we examined the instances in which a contract for the sale of land may be voidable or void at law on account of the legal incapacity of some party thereto to bind himself or herself by such a contract as was purported to be made. It is now proposed to treat of the cases where a sale of land may be voidable in equity because one of the parties stands, either towards the other or towards the beneficial owners of the land or the purchase money, in some relation imposing on him either a conditional or an absolute disability to take under the contract. This kind of relative disability is of a different nature from personal incapacity; strictly so called: but it may conveniently be considered, as a ground for impeaching the validity of the contract, in connexion therewith.

The cases in which this kind of disability may arise may be grouped into three classes:—First, where there is such a confidential relation between the parties to the sale that the presumption of undue influence arises in respect of all contractual dealings between them. Here the person occupying the position of influence is under a conditional disability to take advantage of the sale. Secondly, where one of the parties stands in a fiduciary relation to the other party to the sale as regards the particular property dealt with. Here also the disability is only conditional. And thirdly, where one of the

Relative disability in equity.

Three classes of relative disability.

1. Where there is a confidential relation raising the presumption of undue influence.

2. Where there is a fiduciary relation between the parties as

regards the property dealt with.

3. Where one of the parties is acting under an authority to sell or purchase.

parties stand, not towards the other party to the sale, but towards the beneficial owners of the land or money dealt with, in the relation of agent executing an authority to sell or purchase; in which case he is under an absolute disability to take under the contract, either directly or indirectly, in the opposite capacity of purchaser or vendor.

Confidential relation raising the presumption of undue influence.

The first of these classes has been already examined under the head of Undue Influence (*a*). The reader will remember that a sale of land may be voidable in equity on the ground that one of the parties thereto exercised undue influence over the other; and that undue influence may be alleged either independently or not of the existence of a confidential relation between the parties, which invested the one with a peculiar authority over the other or imposed on him a special duty of advising the other. In the former case the plaintiff claiming to avoid the transaction must give positive proof of the undue influence alleged. In the latter he need only prove the existence of the confidential relation, and it will then be presumed, until the contrary be shown, that the defendant took advantage of his situation; and the *onus* lies on him of proving that the other was not unduly influenced, and gave a perfectly free consent to the contract. In these cases, however, the contract is not avoided unless the alleged undue influence be established, either by positive proof, or by proof of the existence of a confidential relation and failure to rebut the ensuing presumption. And the obligations arising out of the confidential relation do not impose on the party affected thereby an absolute incapacity in equity of contracting with the other. On the contrary, he may so contract; though, if he do, he is saddled with the burthen of

a Above, p. 840.

showing that he did not use his influence to the other's disadvantage. His position is in fact analogous to that of a party to a contract *uberrimæ fidei* (b). The agreement is not impeachable for want of contractual capacity, strictly so called, on the part of the person charged to refrain from undue influence, but it is voidable in case of his failure to prove that he discharged the duties incident to his position; and these include the obligation of making full disclosure of all circumstances, within his knowledge, which affect the value of the property bought or sold (c). At the same time, although confidential relations, which give rise to the presumption of undue influence, do not involve the *absolute* incapacity of the person occupying the position of influence to contract with the other, they affect not only all contractual dealings between the parties with respect to any property of either of them, but also all gifts made between them whilst living in favour of such person (d). It seems, therefore, correct to say that he is subject in equity to a kind of *general* disability as regards the other party; though this disability is not absolute, but only conditional, and is removed on performance of the condition. This class of disability is exemplified in the case of solicitor and client, guardian and ward, parent and child: but the reader will not forget that it is not confined to any particular set of relations, but will arise whenever it is proved that one person stands toward another in any relation, of which the natural consequence would be that the other would come under his influence (e). We need not further discuss this class of disability, which has been fully dealt with above (f).

Solicitor
and client;
guardian
and ward;
parent and
child.

The second class of cases above referred to (g), which Where one party is

(b) Above, pp. 767, 806, 807.

(c) Above, pp. 844—846.

(d) Above, p. 844.

(e) Above, p. 842.

(f) Pp. 840—853.

(g) Above, p. 975.

trustee for
the other of
the property
sold.

is in effect limited to the purchase by a trustee of his *c'estui-que-trust's* interest in the trust property, has been already mentioned incidentally in connexion with the subject of undue influence (*h*): but it does not depend on the same principles exactly as are applicable in the case of undue influence itself. The mere fact that one man is trustee of some property for another does not of itself alone raise the presumption that he exercised undue influence in *all* his contractual dealings with the other, or affect the validity of their contracts relating to other property (*i*). It is true that, owing to incidental circumstances, a trustee may stand towards his *c'estui-que-trust* in such a confidential relation as to raise the presumption of his undue influence in all dealings between them; thus a man may be trustee acting as guardian for an infant (*k*), or trustee acting as business manager or adviser for a young man or a woman or a man unversed in business affairs. In such cases a confidential relation is no doubt established, and the trustee is subject in equity to the consequent general disability (*l*); but this consequence follows, not merely because the one is trustee for the other, but because the incidental circumstances attending the particular case cause the position of trustee to be a position of influence over the other (*m*). It appears, indeed, that gifts made

(*h*) Above, pp. 845, 846, 853.

(*k*) *Hylton v. Hylton*, 2 Ves. sen. 547.

(*i*) See note (*m*) below.

(*l*) Above, p. 977.

(*m*) Consider the judgment in *Hylton v. Hylton*, 2 Ves. sen. 547, 548, 549. "The defendant appears to stand in the place, *not of a common trustee barely of a particular estate*, but of a trustee acting in fact as guardian for the minor, his nephew, and taking care of his person and his estate; so that the condition of these persons, the plaintiff and the defendant, comes within this rule" (*i.e.*, of guardian and ward). It is submitted that the *dicta* of Brougham, C., in *Hunter v. Atkins*, 3 My. & K. 113, 135, 136, 140, with respect to bargains between trustee and *c'estui-que-trust*, are too widely expressed, and must be limited (where not confined to bargains dealing with the trust property) to a trustee occupying in fact a position of influence. Take for example the case of two men contracting with each other in the course of their business. One happens to be a trustee of the other's marriage settlement comprising property in no way connected with

by a *cestui-que-trust* to his trustee by way of bounty or remuneration for the trustee's services, which he is bound to render without deriving any profit for himself, stand on the same footing as gifts to a solicitor from his client or to a guardian from his ward (*n*); and to this extent the trustee seems to labour under a general disability not confined to his acceptance of a present of part of the trust property. But, notwithstanding this result of the fiduciary relation, it does not appear to impose on the trustee any *general* disability as regards *contractual* dealings with his *cestui-que-trust*; and there seems to be no reason to suppose that, where they enter into a contract relating to some matter entirely independent of the trust estate, the trustee is under the obligation of proving the fairness of the transaction and the other's free consent, unless the *cestui-que-trust* can establish that, in the circumstances of the case, the trusteeship placed the trustee in a position of influence over him (*o*). With respect to matters of contract as opposed to gift, the relation of trustee and *cestui-que-trust* appears to subject the trustee to no more than a particular conditional disability affecting only their contracts dealing with the *cestui-que-trust's* interest in the trust property.

The law relating to contracts of this kind is as follows:—A trustee is at liberty to purchase from his *cestui-que-trust* either the whole or any part of the latter's interest in the trust estate; and this is equally the case where the trustee is a trustee for sale (*p*).

his trade. It could not be contended that on proof of this fact alone their business contract would be voidable unless the trustee could establish the fairness of the bargain.

(*n*) *Hatch v. Hatch*, 9 Ves. 292, 296, 297; *Faughton v. Noble*, 30 Beav. 34, 39; *Barrett v. Hartley*, L. R. 2 Eq. 789; *Wright v. Carter*, 1903, 1 Ch. 27, 40, 49, 56, 57; *Re Coomber*, 1911, 1 Ch. 174; see

above, p. 814. — 1911/102, 23

(*o*) Above, p. 978, note (*m*).

(*p*) *Gibson v. Jeyes*, 6 Ves. 266, 270, 271, 277; *Expte. Lacey*, ib. 625, 626 (the rule is "not that a trustee cannot buy from his *cestui-*

Gifts by
cestui-que-trust
to the trustee
by way of
bounty for
his services.

Purchase by
a trustee of
the *cestui-que-*
trust's interest
in the trust
property.

But as his duty as trustee is to make the most of the trust property for the other's benefit, and his position as trustee gives him the best opportunity of becoming acquainted with its true value, he is subject, on contracting to purchase the property himself, to the like obligation as is incumbent on a solicitor buying from his client (*q*). He is bound to take no undue advantage of the vendor and to disclose every circumstance known to him that may affect the value of the property (*r*). The sale is voidable at the vendor's option in case the trustee fail to discharge this obligation; and more than that, in any proceedings to set aside the contract, the vendor need only show that the other party was a trustee for him and bought the trust property from him, and the *onus* will then lie upon the trustee of proving the fairness of the bargain and of his conduct (*s*). It is said that, to enable a trustee to buy the trust property from his *cestui-que-trust*, the relation between them must be dissolved, and they must assume the position of independent bargainers (*t*). But this means that it is for the trustee to show, by proving the fairness of the transaction, that they did really occupy this position (*t*). It does not mean that a release from the trust will absolve the trustee from the obligation incumbent on him in case he afterwards purchase the trust property. As we have seen (*u*), if, while acting as trustee, he obtain information affecting the value of the trust property, and he retire from the trust and afterwards purchase the trust property from the beneficial owners, the sale is voidable by them in case he

que-trust, but that he shall not buy from himself, see below, p. 983; *Coles v. Trecothick*, 9 Ves. 234, 244, 246, 248; *Franks v. Bollans*, L. R. 3 Ch. 717, 718, 719.

(*q*) See previous note.

(*r*) Above, pp. 845, 846.

(*s*) *Denton v. Donner*, 23 Beav.

285, 290; *Luff v. Lord*, 34 Beav. 220, 227; *Cairns, C., Thomson v. Eastwood*, 2 App. Cas. 215, 236; *Plowright v. Lambert*, 52 L. T. 646; *Dougan v. Macpherson*, 1902, A. C. 197.

(*t*) See cases cited above, p. 979, note (*p*).

(*u*) Above, p. 846.

do not disclose the information so acquired. In all other respects purchases by a trustee of his *cestui-que-trust's* interest in the trust property are governed by the same rules as are applicable to a purchase by a solicitor from his client; and it seems unnecessary to repeat here what has been already said concerning such purchases (*x*). It will not be forgotten that where such a purchase by a trustee is set aside for his concealment of information, which he ought to have imparted, he will be required to account for the rents and profits received by him since the sale on the footing of wilful default (*y*).

All contractual dealings, of whatever kind, between a trustee and his *cestui-que-trust*, for the acquisition by the former of the trust estate, or any interest therein, are subject to the same rules as govern the case of sale (*z*). Thus these rules are applicable where a trustee for purchase, who is (as we shall see (*a*)) prohibited from buying his own property in exercise of the trust, sells the same to his *cestui-que-trusts* who pay the price with the trust money. The law as to gifts by a *cestui-que-trust* to his trustee of any interest in the trust property has been already stated (*b*). The principles regulating purchases of the trust property by a trustee from his *cestui-que-trust* apply in every case where one stands in a fiduciary relation to another as regards some particular land, being bound to make the most of it for the other's advantage, and he purchases it himself from the other; as for instance, where an agent for sale of land, or an agent or a steward entrusted with the management of land, buys it openly

The rule governs all contracts giving the trustee any interest in the trust property.

Sale by a trustee for purchase to his *cestui-que-trusts*.

Gifts to trustee by *cestui-que-trust* of the trust property.

Agent purchasing his principal's lands.

(*x*) See above, pp. 842—846, 851—853; *Morse v. Royal*, 12 Ves. 335; *Baker v. Read*, 18 Beav. 398; *Smedley v. Varley*, 23 Beav. 358.

(*y*) Above, p. 853, and n. (*n*).

(*z*) *Turnbull v. Dural*, 1902, A. C. 429.

(*a*) Below, p. 983.

(*b*) Above, p. 979.

from his principal (c). Where such an agent secretly buys the land, with which he is so entrusted, taking a conveyance thereof in the name of another, or otherwise conceals from the principal any interest which he has in the purchase, the transaction is really a sale effected by the agent to himself, falls within the third class of cases above mentioned (d), and is voidable at the principal's option on mere proof of the facts, whether the terms of the bargain were fair or advantageous to the principal or not (e). The same rules apply, according to the circumstances of the case, where an agent for purchase openly sells his own land to his principal or secretly buys it for his principal in attempted exercise of his authority (f).

Purchase by
managing
partner of
another
partner's
share.

Here it may be mentioned that, where a partnership business is so managed by one partner that he alone is directly informed as to the extent and value of the assets of the firm, a purchase by him of any other partner's share in the partnership property is a contract *uberrimæ fidei* (g) and is voidable for mere non-disclosure by him of any fact material to the value of the property sold. This rule arises out of the duty of every partner to disclose to the others all information possessed by him concerning the assets and business of the firm (h). The case is analogous to that of a trustee purchasing his *cestui-que-trust's* interest in the trust property: but it is not the same. Thus it is

(c) Above, p. 845, and notes (g, h, i).

(d) Above, p. 976.

(e) See *Hardwicke v. Vernon*, 4 Ves. 411; *Charter v. Trevelyan*, 11 Cl. & Fin. 714, 732, but it is conceived that the statement there made, that an agent for sale secretly purchasing himself can uphold the transaction by proving that full value was given, is erroneous (1 Dart, V. & P. 40, n. (c), 6th ed.; 39, n. (c), 7th

ed.); *Re Bloye's Trusts*, 1 Mac. & G. 488, 494; S. C., nom. *Lewis v. Hillman*, 3 H. L. C. 607, 628—630; *Duane v. English*, L. R. 18 Eq. 524; *McPherson v. Watt*, 3 App. Cas. 254, 263, 264.

(f) See the two previous notes, and cases as to purchase cited below, p. 984, n. (l).

(g) Above, pp. 767, 807.

(h) *Maddesford v. Austwick*, 1 Sim. 89, 93; *Re Law*, 1905, 1 Ch. 140.

thought that, where a trustee has bought the trust property from his *cestui-que-trust*, the sale would be voidable for non-disclosure as against a subsequent purchaser from the trustee with notice that the parties to the original sale stood in the relation of trustee and *cestui-que-trust* (i). Partners, however, are not under any general equitable disability with regard to the purchase of each other's shares in the partnership; and it is conceived that they must be presumed to be all equally well informed concerning the assets of the firm. It is thought, therefore, that a sale by one partner to another of his share in the partnership would not be voidable as against a sub-purchaser for value, unless the latter had notice, not merely of the partnership relation, but also of the fact that the vendor partner occupied such a position in the management of the partnership business as placed him in sole possession or direct control of the information relating to the extent and value of the assets of the firm.

Purchase by trustee from *cestui-que-trust* voidable against sub-purchaser with notice of the parties' relation.

Reduced to its lowest terms, the rule governing the third class of cases above referred to (k) may perhaps be stated in this way:—Where a man's title to sell or buy some particular piece of land is derived, not from his own beneficial ownership of the land or the money to be employed in the purchase, but from an *authority* in that behalf given to him either by the act of the beneficial owner of the land or money or by statute on such owner's behalf, then he cannot well exercise the authority by selling to or buying from himself, either

Rule where one party to the sale is executing an authority.

(i) It is conceived that this case is exactly parallel to that of a purchase by a solicitor from his client, and that, as the *onus* of upholding the transaction lies on the trustee after mere proof of the relation between the parties, a purchaser from the trustee with notice of that relation is subject to the same burthen; see above,

pp. 845, n. (l), 980; *Spencer v. Topham*, 22 Beav. 573. It is submitted that the suggestion in Sug. V. & P. 695, that the subsequent purchaser must also have notice of the circumstances rendering the sale voidable, cannot be supported.

(k) Above, p. 976.

directly or indirectly; unless the instrument or statute conferring the authority otherwise provide (*l*). And if such instrument or statute allow of no exception in his favour, and in the transaction in which he purports to exercise such an authority to sell or buy he be himself the purchaser or the vendor, either directly or through the mediation of an agent, trustee or nominee for himself, or even (in the case of sale) by sub-purchase from a stranger (*n*), the sale or purchase is voidable in equity at the instance of the beneficial owner of the land sold or money paid in purchase (*n*). The transaction is, moreover, so voidable on the mere proof that the vendor or purchaser was acting in exercise of such an authority and in effect sold to or bought from himself; and it is immaterial whether the terms of the bargain so purported to be made were otherwise fair or were actually advantageous to the parties who seek to set it aside (*o*).

Principle of
the rule.

With regard to the principle on which this rule is founded, we must remark first, that the person invested with such an authority may either stand in a fiduciary relation to the beneficial owner of the property or he may not. In the former case the grounds which may be alleged for the rule are obvious: namely, that the trustee, having every opportunity to find out the true

(*l*) As to an authority to sell, see *Expte. Lacey*, 6 Ves. 625; *Lister v. Lister*, ib. 631; *Lewis v. Hillman*, 3 H. L. C. 607, 628—630; *Franks v. Bollans*, L. R. 3 Ch. 717, 718, 719; *De Bussche v. Alt*, 8 Ch. D. 286; *Farrar v. Farrars, Ltd.*, 40 Ch. D. 395, 404, 409; *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296; *Boyce v. Edbrooke*, 1903, 1 Ch. 836, 843 sq.; *Hudson v. Deans*, 1905, 2 Ch. 647, 652, 653. As to an authority to purchase, see *Lewin on Trusts*, 439, 6th ed.; 583, 11th ed.; *Shayman v. Brandt*, L. R. 6 Q. B. 720, 723; *Erlanger*

v. New Sombrevo Phosphate Co., 3 App. Cas. 1218, 1229, 1236, 1260; *Re Cape Breton Co.*, 29 Ch. D. 795, 803, 811; *North American Land and Timber Co., Ltd. v. Watkins*, 1904, 1 Ch. 242, 248.

(*n*) *Parker v. McKenna*, L. R. 10 Ch. 96, 125, 126; *Williams v. Scott*, 1900, A. C. 499; *Delves v. Gray*, 1902, 2 Ch. 606; see below, p. 987.

(*o*) See n. (*l*), above; *Sanderson v. Walker*, 13 Ves. 601.

(*o*) *Expte. James*, 8 Ves. 337, 348; *Re Bloye's Trusts*, 1 Mac. & G. 488, 491; *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 461, 471.

value of the property and being bound to exercise the authority to the best advantage of the beneficial owner, shall not place himself in a position where his interest is in conflict with his duty (*p*); also, that a trustee shall make no profit by his trust. These reasons are certainly applicable, for instance, in the case of a trustee for sale of land, and would alone be sufficient to prohibit him from buying the property himself. The rule extends, however, to cases in which the authority is conferred for the sole benefit of the person to whom it is given (*q*). Thus, we have seen (*r*) that it applies to a mortgagee selling the mortgaged property under the power of sale expressly contained or implied by statute in the mortgage deed; notwithstanding that in exercising such a power, a mortgagee is held not to be a trustee for the mortgagor, nor to be bound to sell to the mortgagor's best advantage (*s*). In this case, therefore, we are driven to find other grounds for the rule (*t*); and it appears to rest at bottom on the principle that

(*p*) See *Expte. Lacey*, 6 Ves. 625; *Lister v. Lister*, ib. 631; *Expte. James*, 8 Ves. 337, 348; *Re Bloye's Trusts*, 1 Mac. & G. 488, 495; *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 461; *Boyce v. Edbrooke*, 1903, 1 Ch. 836, 843. This principle is so rigidly upheld that a receiver appointed by the Court is prohibited from buying without leave of the Court the property, of which he is receiver, even where the sale is made, not in the action in which he was appointed, but by a mortgagee selling with leave, outside that action; *Nugent v. Nugent*, 1908, 1 Ch. 546.

(*q*) *Re Bloye's Trusts*, 1 Mac. & G. 488, 494; *S.C.*, nom. *Lewis v. Hillman*, 3 H. L. C. 607, 628—630.

(*r*) Above, p. 341.

(*s*) *Warner v. Jacob*, 20 Ch. D. 220, 224; *Farrar v. Farrars, Ltd.*, 40 Ch. D. 395, 411; *Kennedy v.*

De Trafford, 1897, A. C. 180, 185, 192; *Nutt v. Easton*, 1899, 1 Ch. 873, 877, 878; above, pp. 341, 342.

(*t*) It should be noted that the application of the rule to the case of a mortgagee, or a person in the like position, exercising his power of sale, was originally put on the ground of his being a trustee in the exercise of such power and of the consequent conflict between his interest and his duty; *Downes v. Grazebrook*, 3 Mer. 200, 207—209; *Re Bloye's Trusts*, 1 Mac. & G. 488, 494, 495; *Robertson v. Norris*, 1 Giff. 421, 4 Jur. N. S. 155, 443. The true reason of the rule, namely, that a sale by the seller to himself is no sale at all, and is therefore no proper exercise of the authority, was first clearly expounded by Lord St. Leonards, C., in *Lewis v. Hillman*, 3 H. L. C. 607, 628—630. And afterwards, the view

an *authority* given must be strictly pursued (*u*). Where a man is invested with an authority to sell or buy, the mandate is that he shall enter into a *contract* of sale or purchase; that is, a transaction implying a bargain between the person authorised and some *other* person acting independently of him (*x*), the result of which is, that each incurs obligations to the other (*y*). Now, at law, a man cannot make a contract with himself, either alone or jointly with others; if he purport to do so, the transaction is absolutely void as regards him (*z*). It is impossible, therefore, for a man to sell to or purchase from himself at law. But at law he may well contract with any other person than himself; and if that other be bound in equity, under trust, to give him the benefit of the transaction, the trust is a matter of which the common law takes no cognizance (*a*). In equity, however, the substance of the transaction is regarded; and if a man exercising an authority to sell or purchase in effect sell to or buy from himself, the transaction is not considered to be a *sale* at all, and is therefore an improper exercise of the authority (*b*). And for this reason the sale so purported to be made is voidable in equity at the instance of those by or on whose behalf the authority was conferred (*c*).

that a mortgagee exercising his power of sale was in the position of a trustee was repudiated: see previous note.

(*u*) Above, pp. 266—269, 293, 299, 341, 342.

(*x*) See *Lewis v. Hillman*, 3 H. L. C. 607, 628—630; *Franks v. Bollans*, L. R. 3 Ch. 717, 719; *Farrar v. Farrars, Ltd.*, 40 Ch. D. 395, 404, 410; *Moore, Nettlefold & Co. v. Singer Manufacturing Co.*, 1904, 1 K. B. 820.

(*y*) Above, pp. 1, 266.

(*z*) *Mainwaring v. Newman*, 2 B. & P. 120; *Faulkner v. Lowe*, 2 Ex. 595; *Boyer v. Edbrooke*, 1903, 1 Ch. 836; *Re George*

Routhledge & Sons, Ltd., 1904, 2 Ch. 474; *Re W. Tasker & Sons, Ltd.*, 1905, 2 Ch. 587; *Ellis v. Kerr*, 1910, 1 Ch. 529.

(*a*) *Boyer v. Edbrooke*, 1903, 1 Ch. 836, 845; *Wms. Real Prop.* 163, 21st ed.

(*b*) *Sanderson v. Walker*, 13 Ves. 601; *Re Bloye's Trusts*, 1 Mac. & G. 488; *S. C.*, nom. *Lewis v. Hillman*, 3 H. L. C. 607, 628—630; *Farrar v. Farrars, Ltd.*, 40 Ch. D. 395, 409; *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296; *Hodson v. Deans*, 1903, 2 Ch. 647, 652; above, p. 984, n. (*l*).

(*c*) Above, p. 984, n. (*l*).

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The above-mentioned rule may be illustrated by the following examples:—First, a trustee for sale, whether he derive his authority from a trust for or power of sale (*d*), cannot purchase the trust property, either directly or indirectly, from himself if he be sole trustee, or from the other trustees and himself if he have co-trustees (*e*), or from his co-trustees or co-trustee alone (*f*). And an attempted sale of this kind is equally voidable in equity, whether it be made by public auction or private contract (*g*), to the trustee directly or to another person purchasing on his behalf (*h*), or be effected by his retiring from the trust for the purpose (*i*). If, however, a trustee for sale retire from the trust and some time afterwards purchase the trust property from the then existing trustees, the interval being so great that he could not possibly have retired in contemplation of such purchase, the transaction is free from the objection of its being a sale by a trustee to himself (*k*): though the sale would, it is thought, be voidable in case of the purchaser's concealment of any information acquired by him as trustee and affecting the value of the property (*l*). If trustees for sale in good faith sell the trust property to a stranger acting quite independently of them, none of them is at liberty to purchase the whole or part of the stranger's interest pending the completion of the contract; for the contract when completed would amount to a sale of the trust property by the trustee to himself in exercise of his

Examples of the rule :
Trustee for sale.

Retirement in view of purchase.
Purchase long after retirement.

Trustee for sale cannot be sub-purchaser from a stranger pending completion of the original sale.

(*d*) See above, pp. 256, 263, 266.

(*e*) See cases cited above, p. 984, nn. (*l*), (*m*), (*n*), p. 985, n. (*p*); also *Fox v. Mackreth*, 2 Bro. C. C. 400, 2 Cox, 320, 4 Bro. P. C. 258, L. C. Eq.; *Whicheote v. Lawrence*, 3 Ves. 740

(*f*) In this case the authority to sell, being given to all the trustees, is of course not well

exercised.

(*g*) *Expte. Lacey*, 6 Ves. 625; *Lister v. Lister*, ib. 631; *Expte. Bennett*, 10 Ves. 381, 393.

(*h*) Above, p. 984.

(*i*) *Expte. James*, 8 Ves. 337, 352; *Spring v. Pride*, 4 De G. J. & S. 395.

(*k*) *Re Boles and British Land Co.'s Contract*, 1902, 1 Ch. 244.

(*l*) Above, p. 980.

authority to sell (*m*). When the trust property has been fairly sold to a stranger in exercise of a trust for or power of sale, and the contract has been completed, the rules of equity do not prevent any one of the trustees from afterwards buying the property: but, of course, if the purchase by the trustee took place very shortly after the completion of the former sale, the circumstances would be suspicious, and the trustee might have to prove that he acted in good faith (*n*).

Trustee for sale cannot buy from himself as agent for a stranger.

A trustee for sale is no more competent to purchase the trust property as agent for a stranger to the trust than he is to buy it for himself (*o*). For to act as agent on behalf of a purchaser would obviously be in direct conflict with his duty as a trustee for sale (*o*); and, as we have seen (*p*), an authority to sell is not well exercised unless the vendor contract with some other person acting independently of him. So also a trustee exercising a trust or power to invest his trust money in the purchase of land is not at liberty to purchase his own land for the trust, for his interest as vendor would be opposed to his duty as trustee; and such a transaction would not amount to a true contract of purchase and would be an improper exercise of his authority to buy (*q*).

Trustee for purchase.

Trustee in bankruptcy.

The duties of a trustee for sale and the consequent disability to purchase are incumbent on a trustee (and formerly on an assignee) in bankruptcy selling the bankrupt's property in exercise of his statutory power of sale (*r*); on an executor or administrator selling

(*m*) See cases cited above, p. 984, n. (*m*).

(*n*) See *Parker v. McKenna*, L. R. 10 Ch. 96, 126; above, p. 986, and n. (*b*); *Re Postlethwaite*, 60 L. T. 514.

(*o*) *Expte. Bennett*, 10 Ves. 381; *Hesse v. Briaud*, 6 De G. M. & G. 623, 628.

p Above, p. 986.

(*q*) Above, pp. 983, 984, and cases cited in note (*l*).

(*r*) *Expte. Lacey*, 6 Ves. 625; *Expte. Bennett*, 10 Ves. 380, 395; Bankruptcy Rules, 1886, No. 316, expressly applying the principle in question to the trustee and to any member of the committee of inspection.

leaseholds or other personalty of the deceased to raise money for payment of funeral or testamentary expenses or debts (*s*); on an executor selling lands under any power of sale expressly or impliedly conferred on him by the will for the purposes of his office (*t*), or under the power of sale given to him by Lord St. Leonards' Act (*u*) or the Land Transfer Act, 1897 (*x*); and, it is thought, on a tenant for life selling the settled land under the power conferred on him by the Settled Land Act, 1882 (*y*). On the other hand, the rule in question does not apply unless the trustee purchasing or selling be *himself* exercising an authority to sell or buy conferred on him by the instrument creating the trust. Thus a bare trustee (*z*), or a trustee of land under a simple trust of land for one in fee (*a*), is not absolutely incapacitated from purchasing the trust property; for such an one has no power of sale (*b*); and if he buy, the *cestui-que-trust* must necessarily be the vendor (*c*). So also a trustee who has disclaimed or never acted in the trust (*d*), or an executor who has renounced probate or has never intermeddled with the testator's estate (*e*), is under no disability to purchase property sold by the other trustees or executors under any authority vested in them by the terms of the trust-instrument or by virtue of their office.

Rule not applicable where a trustee is not himself exercising an authority to sell or buy.

With respect to sales of settled land to the tenant for life under the settlement, it may be mentioned that,

Trustees selling under a power of sale exer-

(*s*) *Killick v. Flexney*, 4 Bro. C. C. 161; *Watson v. Toome*, 6 Madd. 153; see above, pp. 217, 218, 228, n. (*x*).

(*t*) See *Baker v. Read*, 18 Beav. 398; *Smedley v. Varley*, 23 Beav. 388; above, pp. 225, 226.

(*u*) Above, pp. 226—228.

(*x*) Above, pp. 228—233.

(*y*) See above, pp. 301, 332—335; *Boyce v. Edbrooke*, 1903, 1 Ch. 836; 1 Dart, V. & P. 37, 42,

6th ed.; 39, 7th ed.

(*z*) Above, p. 220, n. (*x*).

(*a*) Above, p. 256.

(*b*) *Parkes v. White*, 11 Ves. 209, 226; above, p. 256.

(*c*) See above, p. 979.

(*d*) *Stacey v. Elph*, 1 My. & K. 195.

(*e*) *Clark v. Clark*, 9 App. Cas. 733; *Re Boles and British Land Co.'s Contract*, 1902, 1 Ch. 241, 247.

disable with the consent of the tenant for life may sell to him.

Sale, purchase, exchange, or partition in favour of tenant for life under Settled Land Act, 1890.

Power to lease land.

where the trustees of a settlement of land are empowered to sell with the consent of the tenant for life, it has been held that they may well sell to him (*f*). And under the Settled Land Act, 1890 (*g*), where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction. It is important to remark, in connection with the sale of land, that the better opinion is that a power to lease land is entirely governed by the rule now under consideration as well as a power to sell, and cannot therefore be well exercised by a lease made, either directly or indirectly, to the donee of the power: unless such a lease be authorised by the instrument conferring the power (*h*). Thus, a lease of settled land cannot well be made by a tenant for life to himself, or (it is thought) to a trustee for himself, under the power of leasing given to him by the Settled Estates Act, 1877 (*h*), or the Settled Land Act, 1882 (*i*). And the Settled Land Act, 1890 (*g*), does not enable any such lease to be made by the trustees of the settlement.

f, *Howard v. Ince*, T. & R. 81; *Dixonson v. Talbot*, L. R. 6 Ch. 32. See *Grover v. Hugell*, 3 Russ. 428, 432; *Beaden v. King*, 9 Hare, 499, 519—521.

(*g*) Stat. 53 & 54 Vict. c. 69, s. 12, passed 18th Aug. 1890.

h Farwell, J., *Boyer v. Ed-*

brooke, 1903, 1 Ch. 836, 843 sq.; dissenting from the opinion expressed by Page Wood, V.-C., in *Bevan v. Habgood*, 1 J. & H. 222, 229. And see *A.-G. v. Clarendon*, 17 Ves. 491, 500.

(*i*) Above, p. 989.

The rules governing the case of a trustee for sale or purchase are equally applicable in every instance in which a person exercising an authority to sell or purchase stands in a fiduciary relation to the person by or on whose behalf the authority was conferred; although the former may not be a trustee under a formally constituted trust. Thus, an agent employed to sell or purchase land, such as an auctioneer, an estate agent, or a solicitor, cannot buy the principal's land from himself for his own use or purchase his own land from himself for the principal (*k*): though he may buy the principal's land *from the principal* or sell his own land *to the principal*, subject to the rules affecting that class of contract (*l*). So also a director of a company cannot purchase the company's land from his co-directors and himself (*m*), and if he sell his own property to the company, the sale is voidable at the company's option (*n*). Nor can the liquidator of a company sell its assets to a trustee for himself (*o*). Promoters also stand in a fiduciary relation to the company which they promote; and if they sell their own property to the company by the agency of themselves acting as directors, and concealing from the shareholders their ownership of the property sold or the nature of their interest in the sale, the contract is voidable at the company's option accordingly (*p*). If, however, persons acquire property at a time when they do not stand in the relation of promoters to any contemplated company, they are at liberty to sell that property to any company which they may afterwards

Persons in a fiduciary position as regards the exercise of an authority to sell or purchase.

Principal and agent.

Directors of a company.

Liquidator.

Promoters.

(*k*) *Oliver v. Court*, 8 Price, 127; above, p. 982, and n. (*v*).

(*l*) See above, pp. 981, 982.

(*m*) *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 461.

(*n*) *Barland v. Earle*, 1902, A. C. 83, 98, 99.

(*o*) *Silkstone and Haigh Moor Coal Co. v. Edey*, 1900, 1 Ch. 167.

(*p*) *Erlanger v. New Sombbrero Phosphate Co.*, 3 App. Cas. 1218, 1229, 1236, 1260; *Re Cape Breton Co.*, 29 Ch. D. 795, 811; *Gluckstein v. Barnes*, 1900, A. C. 240; *Re Lady Forrest, &c., Ltd.*, 1901, 1 Ch. 582, 589, 590; and see *Re Darby*, 1911, 1 K. B. 95.

promote (*q*) : but in order that such a sale may be valid and unimpeachable, it must be carried out through the agency of an independent board of directors informed of the promoters' interests and capable of exercising an unbiassed judgment as to the terms of the sale, or, if the directors be the promoters themselves or their nominees, full disclosure must be made to the shareholders of the promoters' position as vendors and as directors of the purchasing company, of the nature of their interests in the property which they sell to the company, and of their profit (if any) on the sale (*r*).

As already mentioned (*s*), in every instance in which a person exercising an authority to sell or purchase stands in a fiduciary relation to those by whom or on whose behalf the authority was conferred, the rule, that he cannot sell to or buy from himself, may be justified on the principle that he shall not be allowed to place his own interest in conflict with his duty. Even in these cases, however, the rule appears to rest, at bottom, on the ground that a sale or purchase by the authorised person to or from himself is no contract at all, and is therefore no proper exercise of the authority. Expressed in this form, the rule is equally applicable where the person exercising the authority does *not* stand in a fiduciary relation to those by whom or on whose behalf the authority was conferred (*t*). Thus it governs, not only the case of a mortgagee exercising his powers of sale (*u*), but every instance in which a person entitled to a charge on any property is invested with a power or authority to sell the property in order to realise the amount of money charged (*x*). And the reason of the

Application of the rule where the party exercising the authority is not in a fiduciary position.

(*q*) *Gover's case*, 1 Ch. D. 182, 187.

(*r*) See *Lagunas Nitrate Co. v. Lagunas Syndicate*, 1899, 2 Ch. 392; and cases cited in note above.

(*s*) Above, pp. 984, 985.

(*t*) Above, pp. 984—986.

(*u*) Above, pp. 341, 985.

(*x*) *Re Bloye's Trusts*, 1 Mac. & G. 488; *S. C.*, nom. *Lewis v. Hillman*, 3 H. L. C. 607, 628—630.

rule appears to be equally applicable to the exercise of any authority to purchase land.

The rule in question has two corollaries. First, that as the person invested with an authority to sell or purchase cannot well exercise it by selling to or purchasing from himself, so also he cannot well exercise it in favour of any agent employed by him to conduct or act in the sale; for the agent has the same duties as the principal in the matter of the sale (*y*), and their personality is regarded as identical (*z*). Secondly, that where a person authorised to sell or purchase land contracts with an independent buyer or seller, through whom he has himself an interest in the sale opposed to the interest of his principal, then, if the buyer or seller have notice of this fact and of the consequent conflict of interest and duty, the *onus* lies on him of proving the fairness of the transaction; and the sale is voidable, at the option of those by or on whose behalf the authority was conferred, in case of his failure to discharge the burthen of proof (*a*). For example, the solicitor or auctioneer employed to conduct a sale of land by a person selling it under a trust for or power of sale cannot become the purchaser thereof (*b*). And where a building society sells land in exercise of a mortgagee's power of sale, and the secretary or a member of the committee of the society has taken part in conducting the sale, he cannot purchase the land under an exercise of the power (*c*). The first corollary is not, however,

Person invested with an authority to sell cannot well exercise it in favour of his own agent in the matter.

Person exercising an authority in favour of an independent party through whom he has an interest in the sale.

(*y*) *Whitecomb v. Minchin*, 5 Madd. 91; *Re Bloye's Trusts*, 1 Mac. & G. 488, 496; *S. C.*, nom. *Lewis v. Hillman*, 3 H. L. C. 607; *Martinson v. Clowes*, 21 Ch. D. 857; *Farrar v. Farrars, Ltd.*, 40 Ch. D. 395, 409; *Hodson v. Deans*, 1903, 2 Ch. 647.

(*z*) Above, p. 248.

(*a*) *Hesse v. Briant*, 6 De G. M. & G. 323; *Farrar v. Farrars*,

Ld., 40 Ch. D. 395; *Hodson v. Deans*, 1903, 2 Ch. 647, 653.

(*b*) *Downes v. Grazebrook*, 3 Mer. 200, 209; *Re Bloye's Trusts*, 1 Mac. & G. 488; *S. C.*, nom. *Lewis v. Hillman*, 3 H. L. C. 607.

(*c*) *Martinson v. Clowes*, 21 Ch. D. 857; affirmed, 52 L. T. 766, W. N. (1885) 41; *Hodson v. Deans*, 1903, 2 Ch. 647.

applicable unless the purchaser and the person exercising the authority stand at the time of the sale in the relation of agent and principal. Thus, if a solicitor or other agent be employed in a proposed sale by a person exercising an authority to sell, and the sale prove to be abortive, and the relation of principal and agent be dissolved, and some time afterwards the former agent purchase the property, the sale is not *void* according to the rule in question, though it is voidable in case the purchaser took any unfair advantage of his former position as agent and the *onus* lies on him of proving that he did not (*d*). So where one of several mortgagees, who acted as their solicitor, promoted a company to buy the mortgaged property and became a substantial shareholder therein, and the company then bought the property from the mortgagees selling under their power of sale, it was held that the sale, being made to the company, a distinct and independent legal personality, was not void as being a sale to the solicitor mortgagee himself. It was, however, considered that, in view of the conflict between interest and duty involved in the solicitor's position of vendor and shareholder in the purchasing company, the company having notice thereof were charged with the burthen of upholding the sale, as against the mortgagors seeking to redeem; though in the circumstances the sale was upheld (*e*). This illustrates the second corollary. In like manner, where a solicitor authorised by one of his clients to sell the client's land sold it to another of his clients, for whom he acted in the matter of the purchase and the purchaser had notice of the solicitor's position, it was held that the contract was not specifically enforceable at the purchaser's suit unless he could prove that the vendor

*Farrar v.
Farrars, Ltd.*

(*d*) *Nutt v. Easton*, 1899, 1 Ch. 873, 878, affirmed on the ground of laches, 1900, 1 Ch. 29; *Re Bole and British Land Co.'s Con-*

tract, 1902, 1 Ch. 214; see above, pp. 980, 981.

(*e*) *Farrar v. Farrars, Ltd.*, 40 Ch. D. 395.

was at no disadvantage and the transaction was fair (*f'*).

As above stated (*g*), if the instrument creating an authority to sell or purchase expressly or impliedly permit the person, to whom the authority is given, to be himself the purchaser or vendor, the case is taken out of the general rule; and he may well sell to or buy from himself in exercise of the power (*h*). Thus trustees for sale appointed by will are sometimes authorised to become the purchasers of the trust property (*i*). And directors of a company are frequently authorised by the articles of association to contract with the company, provided that their interest in such contract be disclosed (*k*). But, of course, in every case in which a person invested with an authority to sell or purchase is specially empowered to be himself the purchaser or vendor, the terms of the special power must be strictly observed; if not, the general rule will prevail (*l*).

Where the terms of the authority allow of its being exercised in favour of the person, to whom it is given.

We have seen (*m*) that any trustee, notwithstanding that he be a trustee for sale, may purchase the whole or any part of the beneficial interest in the trust property from his *cestui-que-trusts*, subject to the rule governing this particular kind of contract and explained above (*n*). But of course an effective purchase of this kind can only be made of the interests of such of the *cestui-que-trusts* as are *sui juris* (*o*). A trustee for sale may also

Purchase of the trust property by a trustee for sale from his *cestui-que-trusts*; or

by leave of the Court.

(*f'*) *Hesse v. Briant*, 6 De G. M. & G. 623; see above, p. 988.

(*g*) Above, p. 984.

(*h*) *Beaden v. King*, 9 Hare, 499, 519, 520; *Boyce v. Edbrooke*, 1903, 1 Ch. 836, 846, 847.

(*i*) *Davidson*, *Proc. Conv.* Vol. IV. p. 84, n., 3rd ed.

(*k*) See *Imperial Mercantile Credit Assn. v. Coleman*, L. R. 6 Ch. 558; reversed, L. R. 6 H. L. 189, on the ground that

disclosure was not duly made: *Costa Rica Ry. Co. v. Forwood*, 1901, 1 Ch. 746.

(*l*) Consider the cases cited in the previous note; and the case of promoters of a company, above, p. 991.

(*m*) Above, p. 979.

(*n*) Above, p. 980.

(*o*) See *Franks v. Bullous*, L. R. 3 Ch. 717.

be allowed to purchase the trust property by leave of the High Court or another Court of competent jurisdiction (*p*). Where all the *cestui-que-trusts* are absolutely entitled and *sui juris*, and it is proposed that their trustee for sale shall purchase the trust property, it is for them to decide whether he shall be allowed to do so; and if application be made to the Court to execute the trust for sale, the Court will not in the first instance give leave for the trustee to bid at the sale, or to purchase, against the wishes of any of those beneficially entitled. If, however, it prove impossible to sell the estate to anyone else for so good a price as the trustee offers, the Court may then sanction the purchase (*q*). Where any of the *cestui-que-trusts* are infants or otherwise under disability (*r*), or are unborn or unascertained persons, the Court has jurisdiction to give leave on their behalf for the trustee for sale to be himself the purchaser: but such leave will not be given unless it be shown that the trust property cannot be so advantageously disposed of to any other person (*s*). It appears that, where leave is given by the Court for a trustee to bid at a sale by the Court or to purchase the trust property, he is placed in the same position as any other purchaser (*t*), and the sale is not voidable for mere non-disclosure by him of all facts within his knowledge affecting the value of the property. But if, on the application to obtain such leave, the trustee intentionally withhold information which he has acquired and which

Position of trustee for sale buying by leave of the Court.

(*p*) The County Courts have the equitable jurisdiction of the High Court in proceedings for the execution of trusts, where the trust estate does not exceed the value of 500*l.*: stat. 51 & 52 Vict. c. 43, s. 57; and the Courts of Chancery of the counties palatine of Lancaster and Durham exercise equitable jurisdiction; see Wms. Real Prop. 196, 197,

277, n. (*p*), 21st ed.

(*q*) *Expte. James*, 8 Ves. 337, 352, 353; *Tenant v. Trenchard*, L. R. 4 Ch. 537, 545—547.

(*r*) See above, pp. 879, 888, 889, 939.

(*s*) *Campbell v. Walker*, 5 Ves. 678, 681; *Farmer v. Dean*, 32 Beav. 327; *Tenant v. Trenchard*, L. R. 4 Ch. 537, 547.

(*t*) Above, p. 767.

tends to enhance the value of the property, such conduct is fraudulent, and the sale would be voidable accordingly (*u*). Trustees for the purchase of land may in like manner and subject to similar conditions sell their own land to their *cestui-que-trusts* (and not to themselves) (*x*), or may buy the same for the trust with the leave of the Court (*y*).

Trustees for purchase.

Where one invested with an authority to sell or purchase in effect sells to or buys from himself, the persons by or on whose behalf the authority was conferred have the option of affirming or avoiding the transaction; and if they elect to affirm it, the person authorised is firmly bound and cannot maintain, as against them, that the purported exercise of his authority was void (*z*). As in the case of a conveyance induced by fraud or undue influence (*a*), affirmation of the transaction may be either express, or implied from the acts of the parties (*b*); as from long inaction (*c*), or in the case of a purchase from using the land as their own, after they have become aware of the facts entitling them to set the sale aside (*d*). But no inaction or user can be evidence of an intention to affirm the transaction, so long as the injured parties had no knowledge of the facts giving rise to the right to rescind (*e*). When

Rights of the persons injured by the improper exercise of an authority to sell or purchase.

Affirmation may be express or implied.

(*a*) See *Boswell v. Cooks*, 23 Ch. D. 302; reversed, 27 Ch. D. 424; and restored, 11 App. Cas. 232, 235—237, 240; above, pp. 769, 770.

(*x*) Above, p. 979, and n. (*p*).

(*y*) Lewin on Trusts, 439, 6th ed.; 583, 11th ed.

(*z*) *Espte. Hughes*, 6 Ves. 617, 623—625.

(*a*) Above, pp. 828, 829, 852.

(*b*) *Morse v. Royal*, 12 Ves. 355.

(*c*) *Gregory v. Gregory*, 41 Coop. 201, Jac. 631; *Baker v. Read*, 18 Beav. 398, 3 W. R. 118; and see

Harcourt v. White, 28 Beav. 303, 309—311.

(*d*) *Re Cape Breton Co.*, 29 Ch. D. 795; *Ladywell Mounting Co. v. Brookes*, 35 Ch. D. 400; *Re Lady Forrest Mine*, 1901, 1 Ch. 582.

(*e*) *Randall v. Errington*, 10 Ves. 423; *Chalmer v. Bradley*, 1 J. & W. 51, 67, 68; *Charter v. Trevelyan*, 11 Cl. & Fin. 714, 738, 739, 740; *Life Association of Scotland v. Siddals*, 3 De G. F. & J. 58, 74, 77; *De Bussche v. Alt*, 8 Ch. D. 286, 314; above, p. 852, and n. (*q*).

Where the person authorised is in a fiduciary position, and the authority is to sell.

the sale has been once affirmed, either expressly or impliedly, it cannot afterwards be set aside (*f*). If the injured parties choose to avoid the transaction, their rights vary according as the person, to whom the authority was given, did or did not stand in a fiduciary relation to them, and according as the authority were for sale or purchase. In the case of an authority given to a person in a fiduciary position to sell land, the injured parties may claim to have either a reconveyance to them or a resale for their benefit of the property in question, or if the trustee for sale have disposed of the land or any part thereof to a purchaser, from whom it cannot be recovered, they may claim to make the trustee accountable with interest at four per cent. (*g*) for any profit realised by him on such re-sale or else for the true value of the land over and above the price paid on the attempted sale to himself (*h*). And where the land has been so resold, the injured parties are entitled to an inquiry as to the true value of the land when sold by the trustee to himself and as to the profits realised on the resale, and may make the trustee account with interest for the profits realised by him or for the difference between the true value and the price at which he affected to take over the estate, as may be most beneficial to them (*h*). Where a reconveyance is claimed, the trustee for sale must account on the footing of wilful default, but without interest, for all rents and profits received or receivable by him since the sale, and he will be charged with an occupation rent for any part of the property, of which he has been himself in possession: but he may claim the return of his purchase money with interest at four per cent. and an allowance

(*f*) See last note but one; above, p. 829.

g Above, p. 836, n. (*g*).

h *For v. Mackreth*, 2 Bro. C. C. 406, 420, 421, 2 Cox, 320—322; *Hall v. Hallet*, 1 Cox, 134, 139;

Hardwicke v. Vernon, 4 Ves. 411; *Espte. Reynolds*, 5 Ves. 707; *Espte. Hughes*, 6 Ves. 617; *Espte. Lacey*, ib. 625, 630; *Espte. James*, 8 Ves. 337, 351; *Randall v. Errington*, 10 Ves. 423.

for necessary outgoings and substantial improvements and repairs (*i*). If a resale be desired, it will be ordered conditionally on the trustee for sale being obliged to adhere to his purchase in case the price obtained on the resale be less than what he gave for the land (*k*). If the land fetch a higher price on the resale, the trustee may claim to be recouped thereout all sums expended by him in necessary outgoings and substantial improvements or repairs: but he must account, as in the case of reconveyance, for all rents and profits received or receivable by him prior to the resale (*l*). Where there is no fiduciary relation between the person on whom the authority was conferred and those by whom or on whose behalf it was given, it does not appear that the latter can insist on resale if they elect to set the transaction aside; their rights appear to be confined to claiming a reconveyance on such terms as they would be entitled to demand it, if the transaction had never taken place. Thus, if they be mortgagors and the mortgagee has sold to himself in attempted exercise of his power of sale, their right is to redeem, that is, to demand a reconveyance on payment of principal and interest due on the mortgage debt, and costs (*m*). And the mortgagee, having in fact taken possession under colour of a sale to himself, is liable to account as a mortgagee in possession and on the footing of wilful default for all rents and profits actually received or possibly receivable by him in respect of the mortgaged property: but he does not incur the same liability exactly as a trustee for sale. Thus, where the mortgagee being in possession under a colourable sale

Where the person authorised is not in a fiduciary position.

(i) See cases cited in previous note; *Sillstone and High Moor Coal Co. v. Edey*, 1900, 1 Ch. 167.

(k) *Espte. Reynolds*, 5 Ves. 707; *Espte. Hughes*, 6 Ves. 617; *Espte. Lacey*, ib. 625; *Espte. James*, 8 Ves. 337.

(l) *Ibid.*

(m) See *Re Bloye's Trusts*, 1 Mac. & G. 488, 503 sq.; *S. C.*, nom. *Lewis v. Hillman*, 3 H. L. C. 607, 631 sq.; *Natural Resources of Australasia v. United, S. C.*, 4 App. Cas. 391; *Martinson v. Chares*, 21 Ch. D. 857, 861, 862; *Hudson v. Deans*, 1903, 2 Ch. 647.

has resold the whole or a part of the property to a purchaser from whom it cannot be recovered, he is of course chargeable with the actual price received on the resale: but if he resold at a loss, or at an undervalue, he is not chargeable (as a trustee would be (*n*)) with the difference between the actual price obtained on the resale and the true value of the property at the time when he purchased it for himself, but can only be made to account for the difference between the price at which he actually resold and that for which he might, but for his wilful default or negligence, have sold the property to the sub-purchaser (*o*).

Within what limits the sale may be set aside.

Prior to completion.

After completion, the extent of the right varies according to the manner of making the conveyance.

A sale of land made, in exercise of an authority to sell, by the person so authorised to or in trust for himself, is voidable *by* all persons, who may succeed to the estate or right of those by whom or on whose behalf the authority was conferred (*p*). And so long as the sale rests in contract only and has not been completed by conveyance, it is voidable *against* all persons, who claim under it, whether gratuitously or for value, and whether with or without notice of the facts avoiding the sale (*q*). After the contract has been completed, the extent of the injured parties' right to relief varies according as they themselves concurred in the conveyance or as the land were assured by the authorised person alone, in professed exercise of his authority. In the former case the injured persons have themselves conveyed away their own estates and given an apparent and, to some extent, a real consent to the sale; though they might not have so consented if they had known the true facts (*r*). The conveyance is therefore not altogether

(*n*) Above, p. 998.
(*o*) *National Bank of Australasia v. United, &c. Co.*, 4 App. Cas. 391, 410—412.

(*p*) *Randall v. Errington*, 10 Ves. 423; *Charter v. Trevelyan*,

11 Cl. & Fin. 713; *Bailey v. Barnes*, 1894, 1 Ch. 25.

(*q*) Above, pp. 758, 984, n. (*m*); and see *Re Palmer's, &c. Co.*, 1904, 2 Ch. 713.

(*r*) See above, p. 757.

void: although, if the conveying parties were aware of the facts, the assurance may be voidable as a sale by *cestui-que-trust* to trustee, or by principal to agent, or on similar grounds (*s*); and if the facts were fraudulently concealed, it will be voidable as a conveyance induced by fraud (*t*). In either instance, the conveying parties, having by their own act parted with all their estate, have only a bare right of action in equity to set aside the sale. This may be successfully asserted against the purchaser and his trustee or nominee, their representatives in law, and all other persons who may succeed to their estate, either gratuitously, with or without notice of the facts invalidating the sale (*u*), or for value, but with notice of those facts (*x*): but such a right is of no avail against any person claiming under the conveyance as purchaser for value without notice of the impropriety of the sale, whether he has acquired a legal or only an equitable interest in the land (*y*). If, however, the contract were completed by a conveyance made by the person authorised to sell in professed exercise of his authority to assure the land on sale, then, as the transaction is altogether void in equity as an exercise of the authority (*z*), the *equitable* estate or interest authorised to be conveyed never passes away from those persons by whom or on whose behalf the authority was given (*a*). Their right in this case, therefore, is no bare right of action to set aside a conveyance made by themselves, but is the right incident to the ownership of the equitable *estate* in the land to recover possession, when wrongfully ousted. It follows

(s) Above, pp. 979—982, 991.

(t) *Charter v. Trevelyan*, 11 Cl. & Fin. 714; *Lewis v. Holtman*, 3 H. L. C. 607, 630.

(u) *Charter v. Trevelyan*, 11 Cl. & Fin. 714.

(x) *Cookson v. Lee*, 23 L. J. Ch. 473.

(y) See above, pp. 757 and n. *d*, 830, 832, 851, 872, 873, and n. *ee*.

(z) Above, pp. 985, 986.

(a) See *Randall v. Errington*, 10 Ves. 423; *National Bank of Australasia v. United, &c. Co.*, 4 App. Cas. 391; *Bailey v. Barnes*, 1894, 1 Ch. 25.

that, if after such conveyance the whole or any part of the property have been disposed of to a sub-purchaser for value without notice of the facts avoiding the original sale, he is only entitled to retain the property, as against the parties injured by the original sale, in case he has acquired a *legal* estate or interest in the land. If his interest be equitable only, they can recover the property from him, and the plea of purchase for value without notice will afford him no defence (*b*). But if the authority given were ostensibly exercised in favour of some other than the person authorised, and the sub-purchaser had no notice, at the time when he himself purchased an equitable interest, of the facts avoiding the original sale, he may afterwards get in the legal estate from any one, who can and will convey it to him without breach of trust; and he will then be entitled, under the doctrine of tacking, to exclude those seeking to set aside the original sale (*c*).

Tacking.

Illustration
of the dis-
tinction.

The distinction above pointed out (*d*) may be illustrated by the following examples:—If an estate agent authorised to sell his principal's land covertly purchase it himself through the interposition of a third party as

(*b*, *National Bank of Australasia v. United, &c. Co.*, 4 App. Cas. 391, 407; *Bailey v. Barnes*, 1894, 1 Ch. 25. These cases, it is submitted, recognise and illustrate the true principle applicable; which is, that where there is a fraud on a power, the exercise of the authority is altogether void, even as against persons claiming under it as purchasers for value in good faith, unless they can claim the protection of the legal estate; *Duchess v. Cockburn*, 1 Mer. 626; Sug. Pow. 616, 8th ed.; *Cloutte v. Storey*, 1911, 1 Ch. 18. It should be noted, however, that in the old Scotch case of *York Buildings Co. v. Mackenzie*, 8 Bro.

P. C. 42, 70, the sale was set aside without prejudice to the interests of lessees and others who might have contracted *bond fide* with the person purporting to purchase; and this case has been cited as establishing a similar rule in English law: *Lewin on Trusts*, 429, 430, 6th ed.; 571, 573, 11th ed. But it is submitted that this was a mistake.

(*c*) *Bailey v. Barnes*, 1894, 1 Ch. 25; see also *Jones v. Powles*, 3 My. & K. 581; *Young v. Young*, L. R. 3 Eq. 801; above, pp. 342, 343, 477—480, 567.

(*d*) Above, p. 1000.

his nominee, and the sale be completed by a conveyance from the principal to the nominee, the agent's interest in the purchaser not being disclosed, the conveyance is voidable by the principal and his successors in interest as having been induced by the agent's fraud (*e*). But the principal, having parted with his estate in the land by his own act and consent, is left with a bare right of action in equity to set aside the conveyance, and this is not available against any person claiming under the conveyance as purchaser for value without notice of the facts invalidating the conveyance (*f*). Where, however, land is vested in a trustee for sale and he sells and conveys it to a nominee for his own benefit, the legal estate indeed passes to the nominee, but the equitable interest still remains in the *cestui-que-trusts*, and can be asserted by them as against all persons who have subsequently taken the trustee's estate, except only those who have acquired a legal estate or interest in the land as purchasers for value without notice of the facts avoiding the original sale (*g*). So, where a mortgagee in attempted exercise of his power of sale sells and conveys the mortgaged land to a nominee for himself, the mortgagor is entitled to redeem against all persons claiming under the sale as purchasers for value without notice of its invalidity, but having only an equitable estate or interest in the land (*h*).

Here it may be noticed that, if an authority to sell land be exercised by a sale to a nominee for the benefit of the person authorised, and the sale be completed by the execution of a mere power (strictly so called) to convey the land, the nominee may not in some cases

The legal estate may not always pass on a sale by a person exercising an authority to sell to a

(*e*) *Charter v. Trevelyan*, 11 Cl. & Fin. 714.

(*f*) Above, pp. 757, and n. (*d*), 830, 832, 851, 872, 873, and n. (*o*), 1001.

(*g*) *Randall v. Errington*, 10 Ves. 423, 429, where the sub-

sale had obviously been completed by conveyance.

(*h*) *National Bank of Australasia v. United, &c. Co.*, 4 App. Cas. 391, 407; *Bailey v. Barnes*, 1894, 1 Ch. 25.

nominee for
his own
benefit.

obtain the legal estate. He will obtain it if at law the terms of the power have been complied with (*i*): but otherwise not (*k*). For instance, it appears to be a condition precedent to the valid exercise at law of the power of sale and conveyance given to a tenant for life by the Settled Land Act, 1882, that the sale shall be made at the best price that can reasonably be obtained (*l*). So, if he were to sell at an undervalue to a nominee for himself, it appears that the legal estate would not pass by his conveyance in attempted exercise of the statutory power (*m*). And it is thought that a sub-purchaser from the nominee could be in no better position, notwithstanding that he bought without notice of the facts avoiding the original sale (*n*).

Terms of
setting aside
the sale where
the authority
is to pur-
chase.

The same principles apply in the case of an authority to buy land exercised by a purchase of the authorised person's own property. Those who gave the authority, or their successors in interest, have the right to set aside the sale and to claim repayment of the purchase money with interest at 4 per cent., but must themselves re-convey the land and account for the rents and profits received during their possession of it (*o*). It appears, however, that, as in the case of a purchase induced by fraud (*p*), the purchase cannot be set aside if by the purchaser's own act it has become impossible for him to make entire restitution of the land (*q*). Thus, where he has sold the whole or a substantial part of the land (*r*), or has extensively worked mines thereunder (*q*), he can

Where entire
restitution
is impossible
through the
act of the
party injured.

i Above, p. 985.
(k) Above, pp. 293, 299.
(l) Above, pp. 301, 332.
(m) See above, pp. 301, 332—
334, and notes (*t*), (*b*).
(n) Above, p. 333, and n. (*t*).
(o) *New Sombrero Phosphate Co.*
v. Erlanger, 5 Ch. D. 73, 125; affirmed, 3 App. Cas. 1218. It appears that the purchaser is not liable to account on the footing

of wilful default, except a special case be made out against him; see above, p. 853.

(p) Above, pp. 829, 830.

(q) *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1278; *Lagunas Nitrate Co. v. Lagunas Syndicate*, 1899, 2 Ch. 392, 416, 423, 433, 456, 463, 464.

(r) *Re Cape Breton Co.*, 29 Ch. D. 795.

no longer claim to have the purchase set aside. But it is not every act of waste or deterioration that will prevent the rescission of the transaction; if the consequent alteration of the property may be justly compensated by a money payment, a Court of Equity will nevertheless order the purchase to be set aside on the terms of the purchaser paying compensation accordingly (s). Where a man, exercising an authority to purchase vested in him in a fiduciary capacity, has covertly bought property, which is really his own, and the persons who gave the authority have by their own act, done in ignorance of the impropriety of the purchase, made it impossible for them to offer entire restitution, it appears that they may nevertheless recover compensation from him for any loss which they have suffered through his breach of trust. Thus, if the property were not fairly worth the price paid for it, they might, it is thought, recover the difference between the real value and the price (t). But where an agent for purchase, without fraudulent intent, buys land for his principal, which he had himself acquired before the commencement of the agency, and the principal becomes aware of the agent's interest and afterwards sells the land or works, as his own property, mines thereunder, then the principal, acting with knowledge of the facts, has in effect affirmed the purchase (u); and in this case he cannot, it appears, treat the agent as having been a trustee of the land for his benefit as from the time when the agent acquired it, and so make the agent accountable for any profit he has realised on the sale (x). If, however, the agent's conduct were

Where the act was done in ignorance of the facts which entitled him to rescind.

Where the act was done with knowledge of such facts.

(s) See note (g), above, p. 1004.

(t) See *Re Ambrose, &c. Co.*, 14 Ch. D. 390, 394; *Re Cape Breton Co.*, 29 Ch. D. 795, 811; *S. C.*, nom. *Bentinck v. Fenn*, 12 App. Cas. 652, 659; cf. above, p. 998.

(u) Above, p. 997; *C. A.*,

Lydney, &c. Co. v. Bied, 33 Ch. D. 85, 94; Collins, L. J., *Re Olympia, Ltd.*, 1898, 2 Ch. 153, 179.

(x) *Great Luxembourg Ry. Co. v. Maynay*, 25 Beav. 586; *Kimber v. Barber*, L. R. 8 Ch. 56, 57, n., 59; Cairns, C., *Erlanger v. New*

Actual fraud
of the agent.

actually fraudulent, the principal would be entitled to affirm the purchase and at the same time to claim compensation for any loss he had incurred (*y*); and where a trustee or a common agent for purchase covertly buys his own land for the *cestui-que-trust*, not disclosing his own interest in the transaction, such concealment is of itself sufficient evidence of fraud (*z*). Where an agent for purchase buys land on his own account after the agency has been constituted, and affects in exercise of his authority to purchase that land for his principal, at an increased price, he is of course accountable to the principal for any profit he has made, having been in effect a trustee of the land from the time when he bought it (*a*).

Agent for
purchase
selling his
own land
bought since
the agency
commenced.

Title derived
through a
conveyance
open to the
objection of
undue influ-
ence, or made
by *cestui-que-
trust* to
trustee.

Where on a sale of land the purchaser has notice from the abstract or otherwise (*b*), that the vendor derives title through a sale or other conveyance made in favour of one occupying a position, from which undue influence would be implied (*c*), or made of a *cestui-que-trust's* interest in the trust property to his trustee (*d*), the purchaser's advisers should point out the consequent objection (*e*) to the title and require the vendor to furnish evidence that the circumstances and terms of the apparently objectionable transaction were

Sombrero Phosphate Co., 3 App. Cas. 1218, 1235, 1238, 1242; *Re Cape Breton Co.*, 26 Ch. D. 221, 29 Ch. D. 795; affirmed on other grounds, nom. *Berdinck v. Finn*, 12 App. Cas. 652; *Ladywell Mining Co. v. Brookes*, 35 Ch. D. 400; *Lagunas Nitrate Co. v. Lagunas Syndicate*, 1899, 2 Ch. 392; *Re Lady Forrest Mine*, 1901, 1 Ch. 582; *Burland v. Earle*, 1902, A. C. 83, 87, 98, 99; but see *Re Olympia, Ltd.*, 1898, 2 Ch. 153, 170, 178, 179.

(*y*) Above, pp. 806, 812, 822, 823.

(*z*) *Charter v. Trevelyan*, 11 Cl. & Fin. 714, 738, 739; *Lewis v. Hillman*, 3 H. L. C. 607, 630.

(*a*) *Tyrell v. Bank of London*, 10 H. L. C. 26; *Kimber v. Barber*, L. R. 8 Ch. 56; *North American Land and Timber Co., Ltd. v. Watkins*, 1904, 1 Ch. 242, 248; see also *Re Olympia, Ltd.*, 1898, 2 Ch. 153, affirmed nom. *Gluckstein v. Barnes*, 1900, A. C. 240.

(*b*) *Spencer v. Topham*, 22 Beav. 573; above, pp. 237, 238, 246 sq.

(*c*) Above, pp. 975—977.

(*d*) Above, pp. 978—983.

(*e*) Above, pp. 976, 980.

such as to render it perfectly valid (*f*). If the vendor can produce such evidence, the purchaser will have to accept the title on that point; for when such an objection has been so removed, the Court does not consider the title too doubtful to be forced upon an unwilling purchaser, notwithstanding that the evidence offered do not include any testimony given by or conclusively binding the persons, who would be entitled to set the transaction aside (*g*). If, however, a vendor's title be derived through a sale made by a person, exercising an authority to sell, in his own favour, the nature of the objection to the title is entirely different; as in equity the exercise of the authority is void, and the equitable estate authorised to be conveyed has never passed away from the persons by whom or on whose behalf the authority was conferred (*h*). In this case, therefore, the purchaser cannot be obliged to accept the title, without the concurrence of those persons or their successors in estate, all being *sui juris* (*i*).

Title derived through a sale by one exercising an authority to sell to himself.

(*f*) See above, pp. 814, 815.

(*g*) *Spencer v. Topham*, 22 Beav. 573, 582.

(*h*) Above, pp. 983 *sq.*, 998 — 1004.

(*i*) *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296; *Delex v. Gray*, *ib.* 606, 611.

CHAPTER XVIII.

OF THE DISCHARGE OF THE CONTRACT.

- § 1. Of the Discharge of the Contract before Breach,
and by Performance.
- § 2. Of Breach of the Contract and Discharge therefrom
after Breach.
-

Discharge of
the obliga-
tions of the
contract.

HAVING finished the subject of the avoidance of the contract for fraud or other causes (*a*), it is now proposed, before considering the remedies for breach of the contract, to examine the various ways in which the obligations arising out of the contract (*b*) may be discharged, and the parties freed from the legal bond which unites them. This discharge may take place either before the performance and before any breach of the contract, or at the time and by the very fact of performance of the contract, or after a breach of contract has occurred.

§ 1.—*Of the Discharge of the Contract before Breach, and
by Performance.*

Discharge of
contract
before breach.

A contract may be discharged before any breach of its provisions has occurred, first, by the agreement of all parties thereto; secondly, for impossibility of performance; and, thirdly, in consequence of the bankruptcy, since the making of the contract, of one of the parties thereto. Discharge of the contract by agreement may

(*a*) Above, pp. 747 *sq.*

(*b*) Above, p. 1.

take any of the following forms:—(1) Simple and express waiver or abandonment of the contract; (2) implied waiver by entering into a new contract inconsistent with the performance of the old; (3) non-fulfilment of some condition imposed by mutual assent and taking effect either as a condition precedent to the existence of the contract or as a condition subsequent annulling it; and (4) rescission in exercise of an express proviso in that behalf contained in the contract.

With regard to the first of these forms of discharge by mutual assent, so long as a contract remains executory on both sides, consisting of mutual promises only, it may be discharged, before breach, by the parties' simple agreement to waive performance of, or to abandon, the contract (*c*). In this case each exonerates the other from the performance of his part of the contract in consideration of receiving the like exoneration himself; so that the release of each by the other is given for valuable consideration (*d*). And the oft-cited statement that "a simple contract may, before breach, be waived or discharged, without a deed and *without consideration*" (*e*), can only be accepted as applying to a contract wholly executory, and with the qualification that "without consideration" must be taken to mean "without *other* consideration than is implied in the *mutual* abandonment of the contract" (*f*). Where the contract has been executed on one side, it appears that, as a rule, the party who still remains under obligation

Discharge by agreement.

1. Express waiver.

c) *Price v. Dyer*, 17 Ves. 356, 364; *Robinson v. Page*, 3 Russ. 114, 119; *Goss v. Nugent*, 5 B. & Ad. 58, 65, 66; *Vezy v. Rushleigh*, 1904, 1 Ch. 634, 636.

d) See *King v. Gillett*, 7 M. & W. 55, 59; *Moore v. Crofton*, 3 Jo. & Lat. 438, 445; *Dobson v. Espie*, 2 H. & N. 79.

e) *Dobson v. Espie*, 2 H. & N.

79, 83; *Edwards v. Walters*, 1896, 2 Ch. 157, 161.

f) The law is correctly stated by Parke, B., in *Foster v. Dawber*, 6 Ex. 839, 851: "It is competent for both parties to an executory contract by mutual agreement without any *satisfaction* to discharge the obligation of that contract."

Bills and
notes.

Simple
contracts.

Contracts
required to be
put in
writing.

Special
contracts.

can only be released by agreement to that effect when made under seal or for valuable consideration; and a promise or assurance of release given without consideration, either in words or unsealed writing, is of no effect (*g*). The only exception to this rule occurs in the case of bills of exchange and promissory notes, which may be discharged by the holder's absolutely and unconditionally renouncing, at or after maturity, his rights against the acceptor or maker, provided that the renunciation be in writing, or the bill or note be delivered up to the acceptor or maker thereof (*h*). All simple contracts may be discharged, before breach, by a *parol* agreement of waiver or abandonment, if made for valuable consideration (including mutual exoneration in the case of executory contracts); and, according to the preponderance of authority, this rule applies not only to contracts governed by the Common Law, but also to those required by statute to be put in writing (*i*). But such an agreement, being itself a contract, must be established by as clear evidence as would be required to prove the formation of any other *parol* contract (*k*). With regard to special contracts, the common law rule was that a covenant could not be discharged, before breach, by any agreement made between the covenantor and covenantee for valuable consideration, but without deed (*l*), although in all other respects than as

(*g*) *Foster v. Dauber*, 6 Ex. 839, 851; *Edwards v. Walters*, 1896, 2 Ch. 157, 168; above, p. 3.

(*h*) Stat. 45 & 46 Vict. c. 61, ss. 62 (1), 89, adopting the rule laid down in *Foster v. Dauber*, 6 Ex. 839, but imposing the further requisite of writing or delivery up of the document; see *Edwards v. Walters*, 1896, 2 Ch. 157.

(*i*) *Gann v. Salisbury*, 1 Vern. 240; *Davis v. Symonds*, 1 Cox, 402, 406; *Noble v. Ward*, L. R. 1 Ex. 117, 2 Ex. 135, 137, as to

the contract of Aug. 12; and cases cited above, p. 1009, n. (c); see Sug. V. & P. 167, 168; Benjamin on Sale, 159, 2nd ed.

(*k*) *Carolan v. Brabazon*, 3 Jo. & Lat. 200, 209; *Moore v. Crofton*, ib. 438, 445; *Clifford v. Kelly*, 7 Ir. Ch. Rep. 333; *Cartan v. Bury*, 10 Ir. Ch. Rep. 387, 400; *Whittaker v. Fox*, 14 W. R. 192; *Harrison v. Brown*, 14 W. R. 193, n.; Sug. V. & P. 167.

(*l*) *Heard v. Wadham*, 1 East, 619; *Kaye v. Waghorn*, 1 Taunt. 428; *Brymer v. Thames, &c. Ry.*

operating to discharge the covenant, the new agreement was valid and enforceable as an independent parol contract (*m*). In equity, however, it was established that such an agreement should amount to a valid discharge, and the covenantee would thereafter be relieved against any attempt by the covenantor to enforce the contract at law (*n*). Since the commencement of the Judicature Acts it has been decided that in this respect the rule of equity shall prevail (*o*). The result appears to be that there is now no difference between simple and special contracts as regards the manner or form of their discharge prior to breach; and that a contract for the sale of land may be discharged, before breach, by an express parol agreement of waiver or abandonment, if made for valuable consideration, whether the memorandum of the contract were signed only or executed under seal.

Discharge
before breach
of contracts
to sell land.

A contract may also be discharged, before breach, by implied waiver, that is, by the parties entering into a new contract inconsistent with the performance of the old; as if A. contract to sell Blackacre to B. for 1,000*l.*, and it be agreed between them, before breach, that C. shall be the purchaser instead of B. (*p*); or that B. shall take Whiteacre instead. But in order that a new agreement may operate as an implied waiver of a pre-existing contract, its terms must be inconsistent with the performance of the earlier contract; it must be such as can only be carried out by the entire abandonment of the old agreement. A mere alteration of some term or terms of the old contract is not sufficient (*q*).

2. Implied
waiver.

Co., 2 Ex. 549, 5 Ex. 696; *Mayor of Berwick v. Oswald*, 1 E. & B. 295; *Spence v. Hooley*, 8 Ex. 668.

(*m*) *Nash v. Armstrong*, 10 C. B. N. S. 259.

(*n*) *Laneshorough v. Oakshott*, 1 Bro. P. C. 151; *Hill v. Gorman*,

1 Beav. 549, 5 My. & Cr. 250; *Webb v. Hewitt*, 3 K. & J. 438.

(*o*) *Steele v. Steele*, 22 Q. B. D. 537.

(*p*) *Moss v. Marraich*, L. R. 1 Ch. 217, 222.

(*q*) *Price v. Dyer*, 17 Ves. 356; *Robinson v. Page*, 3 Russ. 111;

A contract, invalid for want of writing, cannot be set up as an implied waiver of a prior contract.

Besides this, the new agreement must be perfectly valid and enforceable at law (*r*), or at least, in equity. For example, if A. sell Blackacre to B. for 1,000*l.*, the sale to be completed at one month's date, and before breach it be agreed in writing, duly signed, that the price shall be 950*l.*, or that two-thirds of the purchase money shall be left on mortgage, or that an inferior title to that stipulated for shall be shown, or that the time for completion shall be extended to six weeks, the other obligations under the contract are not discharged (*s*), although it is true that from one point of view they may be regarded as incorporated in an entirely new agreement (*t*). And if, after such a contract, but before breach, the parties *orally* agree that C. shall be the purchaser instead of B., or that Whiteacre shall be substituted for Blackacre, it appears that the original contract still remains undischarged, and may be specifically enforced on either side. For, as we have seen (*u*), the law requires all contracts for the sale of land to be put in writing and signed by the party to be charged, or else they shall not be enforced. Parol evidence is therefore inadmissible to prove the new agreement for what it purports to be, that is, a new contract inconsistent with the performance of the old. And it has been decided that in such case the new agreement shall not be put in evidence, without signed writing, to establish an implied parol waiver of the old contract (*x*). If, however, the new agreement were

Vezey v. Rushleigh, 1904, 1 Ch. 634; see also *Goss v. Nugent*, 5 B. & Ad. 58; *Harvey v. Graham*, 5 A. & E. 61; *Stouch v. Robinson*, 3 Bing. N. C. 928.

Stead v. Dawber, 10 A. & E. 57; *Marshall v. Lynn*, 6 M. & W. 109; *Mare v. Campbell*, 10 Ex. 323; *Noble v. Ward*, L. R. 2 Ex. 135. These are cases relating to the 17th section of the Statute of Frauds: but their principle

is equally applicable to cases governed by the 4th; see preceding note; *Marshall v. Lynn*, 6 M. & W. 109, 117. The statements in Fry, Sp. Perf. § 1039, 3rd ed. and 4th ed., appear to have been made in ignorance of these decisions.

(*s*) See note (*q*), above, p. 1011.

(*t*) See note (*r*), above.

(*u*) Above, p. 3.

(*x*) See note (*r*), above.

specifically enforceable in equity under the doctrine of part performance (*y*), it is thought that, according to the present law and practice, it would effectively operate as a discharge of the old contract, and might, for that purpose, be proved by oral evidence (*z*). And if it were an *express* term of the new agreement that the old contract should be abandoned, it appears that such express waiver (*a*) might be proved by parol evidence, although the other terms could not (*b*). So also if, after making the contract but before breach, the parties agree by word of mouth to alter some term or terms only of the contract, the obligation of the contract is not in any way discharged, and either party may enforce specific performance of the contract in its original form (*c*). For all the terms of an agreement for the sale of land must be put into writing and signed in order to satisfy the Statute of Frauds (*d*); so any alterations in such terms must necessarily assume the same form (*e*). And the doctrine of setting up a parol variation in defence to an action for specific performance (*f*) applies only where the term orally agreed upon is assented to at the time of, and not after, the formation of the written contract (*g*). But where a parol agreement made after the execution and varying the terms of a written contract to sell land has been so acted upon that it would be fraudulent or unfair to insist on the original contract, the variation may be asserted as a defence to an action for specific performance of the contract contained in the memorandum (*h*). And the contract, as so varied, may be

Parol alteration of the terms of a contract required to be in writing.

The alterations must be put in writing and signed.

Parol variation may be effectual where there is part performance.

(*y*) Above, p. 13.

(*z*) See above, p. 1011 and n. (*o*).

(*a*) Above, pp. 1009—1011.

(*b*) See *Noble v. Ward*, L. R. 1 Ex. 117, 2 Ex. 135, as to the contract of Aug. 12.

(*c*) See above, p. 1011 and n. (*q*).

(*d*) Above, pp. 3, 4.

(*e*) See cases cited in n. (*r*) to

p. 1012, above; *Robson v. Collins*, 7 Ves. 130, 133.

(*f*) Above, p. 788.

(*g*) See cases cited above, n. (*q*) to p. 1011; Fry, Sp. Perf. § 809, 3rd ed.

(*h*) *Legal v. Miller*, 2 Ves. sen. 299; *Price v. Dyer*, 17 Ves. 356, 364.

decreed to be specifically enforced, if the acts of part performance have been sufficient to satisfy the equitable doctrine in that behalf (*i*).

3. Discharge
by non-
fulfilment of
a condition.

A pure con-
dition.

Condition
precedent.

A third form of discharge of a contract, before breach, by mutual assent is where the contract has been made subject to the fulfilment of some condition precedent or subsequent, and this condition is not fulfilled. Here we are speaking of a condition pure and simple, of which the fulfilment is not warranted by either party; so that no cause of action for damages can arise from any breach thereof. Examples of a condition precedent are where it is agreed that, if a field shall be found, on measurement, to contain three acres at least, or if the drains of a house shall be tested and certified to be in good order, or if a house shall be put into good repair (*k*), or if a railway bill in Parliament shall pass (*l*), or a railway shall be made (*m*), the field or house or some land on the proposed line of railway shall be sold; or where an option to purchase land is given to be exercised by giving some specified notice within a limited time (*n*), or where A. agrees to sell part of Blackacre to B., if he (A.) can, within one year, purchase Blackacre from C. (*o*), or where A. agrees to sell lands to B. at a price to be fixed by a certain valuer, or two valuers or their umpire (*p*). In these cases there is no enforceable contract of sale until the condition has been fulfilled; and, on failure of the condition, all obligation between the parties is at an end (*q*). Instances of a condition subsequent are where

(*i*) 5 Vin. Abr. 522, pl. 38; Sug. V. & P. 165; Fry, Sp. Perf. § 1038, 3rd ed.; above, p. 13.

(*k*) *Cumtner v. Macpherson*, 5 Moo. P. C. 83.

(*l*) *Hawkes v. Eastern Counties Ry. Co.*, 1 De G. M. & G. 737, 5 H. L. C. 331.

(*m*) *Gage v. Newmarket Ry. Co.*, 18 Q. B. 457.

(*n*) Above, p. 535, n. (*r*); *Bruner v. Moore*, 1904, 1st Ch. 305.

(*o*) See *Wylson v. Dunn*, 34 Ch. D. 569, 577, 578.

(*p*) Above, p. 61.

(*q*) *Regent's Canal Co. v. Ware*, 23 Beav. 575, 586; *Scott v. Liver-*

some land is sold by an agreement which stipulates for immediate payment of a deposit and investigation of title or delivery of possession, but is to be annulled if some contemplated application to the Court be refused, or some bill in Parliament be thrown out next session, or water be not found on boring for it; or where, by a similar agreement, fixing a future day for completion, an equity of redemption is sold subject to the mortgagee's consenting to allow the mortgage to remain for a certain term (*r*), or leaseholds not assignable without the lessor's consent are sold subject to such consent being obtained (*s*). Here a valid contract is at first formed, but is discharged on non-fulfilment of the condition. In cases like these, the vendor does not warrant the fulfilment of the condition; but he is bound, so far as the performance thereof rests with himself, honestly to use his best endeavours to procure fulfilment, and will be liable to substantial damages for a breach of this duty (*s*). And, in the absence of stipulation to the contrary, he has all the time until the day fixed for completion to procure fulfilment of the condition (*r*). It is obvious that the occurrence of the same event may form a condition precedent or subsequent according to the intention of the parties as expressed in the terms constituting the whole contract (*t*).

Lastly, a contract may be discharged, before breach, by mutual assent on the exercise of an express power reserved to either party to rescind the agreement. An instance of this occurs in the power commonly inserted in contracts to sell land and enabling the vendor to

Condition
subsequent.

4. Exercise of
a proviso for
rescission.

Power to
vendor to
rescind in
case of an

pool Corp., 3 De G. & J. 334;
Molten v. Snowball, 29 Beav. 641,
affirmed 31 L. J. Ch. 44; *Williams*
v. Briscoe, 22 Ch. D. 441.
(*r*) *Smith v. Butler*, 1900, 1
Q. B. 694.

(*s*) *Day v. Singleton*, 1899, 2 Ch.
320; above, pp. 359—361.

(*t*) *Acherley v. Vernon*, Willes,
153, 156, 157; *Hotham v. East*
India Co., 1 T. R. 638, 645;
2 Jarm. Wills, 1470, 1471, 6th ed.

unwelcome
requisition.

rescind the contract if the purchaser shall insist on any objection or requisition which he is unable or unwilling to comply with (*u*). And an express power for the vendor to re-sell the land, in case of the purchaser's non-compliance with the terms of the contract (*x*), implies an agreement that, on the exercise of this power, the contract shall be rescinded (*y*). Sometimes a power is reserved for the purchaser to rescind if the vendor shall not erect some houses or buildings within a specified time (*z*).

Whether
parties are
entitled to
*restitutio in
integrum*
where a con-
tract partly
performed is
discharged by
mutual
consent.

When a contract which has been partly performed is discharged before breach by mutual agreement, the questions, whether matters are to remain as they are, or whether the parties are entitled to be restored wholly or partly to their former position, can only be solved by reference to the terms of the agreement. It is usual to provide particularly for this, where a contract is expressly made voidable on the non-fulfilment of some condition subsequent, or where an express power to rescind the contract is given (*a*). Where it has been agreed, as a term of a contract intended to be immediately performed, in whole or in part, that it shall be *annulled* on non-fulfilment of some condition subsequent, it is thought that, in the absence of stipulation to the contrary, the parties would be impliedly entitled to *restitutio in integrum* (*b*), as in the case of rescission for innocent misrepresentation (*c*); for the rule is that the *rescission* of a voidable contract cannot take place with-

(*u*) Above, pp. 67, 72, 90, 169, 182—188, 732.

(*x*) Above, pp. 68, 69, 74.

(*y*) Above, p. 54, n. (*f*).

(*z*) *Whitbread & Co. v. Watt*, 1902, 1 Ch. 835.

(*a*) Above, pp. 72, 360; and see previous note.

(*b*) *Elliott v. Crutchley*, 1904, 1 K. B. 565, 569, affirmed, 1906, A. C. 7. Thus at common law,

after a sale of goods, conditioned to be annulled if the goods sold be not of a certain quality, the purchaser is at liberty to return the goods on ascertaining that they are not of the quality stipulated: *Bannerman v. White*, 10 C. B. N. S. 844; above, p. 808.

(*c*) Above, pp. 834—836.

out entire restitution (*d*). Thus, if a contract be made for the present sale of land, providing for immediate payment of a deposit or further sum on account of the purchase money and for entry into possession, and conditioned to become *void* on the refusal of some contemplated application to the Court or on failure to find water or gold there, it is thought that, on the occurrence of the avoiding event, the vendor would have to return the money paid on account of the purchase money, with interest, and the purchaser to give up possession of the land, and to account for any rents or profits received by him (*e*), and to return the abstract of title (*f*); and each would have to bear his own expenses incurred in connection with the contract, as of investigating the title. But, as we shall see, it is otherwise if the agreement be, not that the contract shall be avoided *ab initio*, but that its further performance shall be dispensed with. This brings us to the subject of discharge for impossibility of performance.

(*d*) *Clough v. London and North Western Ry. Co.*, L. R. 7 Ex. 26, 37; *Lagunas Nitrate Co. v. Lagunas Syndicate*, 1899, 2 Ch. 392, 423; above, pp. 829, 830, 834 *sq.*, 852, 1001. It is submitted that this rule was overlooked by Cozens-Hardy, J., in *Cornwall v. Henson*, 1899, 2 Ch. 710, reversed on another point, 1900, 2 Ch. 298, where he decided that, on a contract to sell land for a price payable by instalments, the vendor rescinding the contract for the purchaser's renunciation of it (see below, pp. 1040—1042) before payment of the last instalment was nevertheless entitled to retain all the instalments already paid. It became unnecessary to review this decision in the Court of Appeal, but the Court very plainly intimated their doubts of its correctness; 1900, 2 Ch. 302, 305. The rule in *Whineup v.*

Hughes, L. R. 6 C. P. 78, to which Cozens-Hardy, J., appealed as the general rule (1899, 2 Ch. 715), was that applicable in the case, not of *rescission* of the contract, but of its discharge for impossibility of performance. In such case the contract is not rescinded: the parties are simply excused from further performance; below, pp. 1018—1021.

(*e*) Above, pp. 834, 835 and n. (*g*).

(*f*) The abstract must be returned by the purchaser whenever the contract is rescinded from any cause, whether in pursuance of an express power in that behalf or otherwise, and whether before or after breach; and the purchaser is not entitled in such case to keep any copy of it; see *Roberts v. Wyatt*, 2 Taunt. 268, 278; Sug. V. & P. 428.

Impossibility
of perform-
ance.

A contract for the sale of land may be discharged, before breach, on the ground of impossibility of performance. This form of discharge is perhaps no more than a species of discharge by mutual assent on failure of a condition subsequent; it is the impossibility, not so much of performing the contract as of fulfilling the condition on which alone it was to be carried out, that is the ground of release (*g*). But this kind of discharge only occurs where the parties have not expressly contemplated or provided for the event of failure of the condition, so that their assent to the discharge is purely an implication of law (*h*); and it may therefore be conveniently considered by itself. Discharge by impossibility of performance is illustrated where a particular thing is sold for delivery on a future day, subject to the implied condition, pure and simple (*i*), that it shall then be in existence, and before that day the thing is destroyed without the vendor's fault. In this case the contract is discharged; for it is intended, by implication of law, that in case the necessary condition of performing the agreement be rendered impossible of fulfilment without the parties' fault, they shall be excused from carrying out their mutual undertaking (*k*). We have seen (*l*) that, as a rule, the estate in land sold belongs in equity to the purchaser, and the property stands at his risk, as from the date of the agreement to sell; and in consequence of this rule the obligation of the contract is not discharged by the practical destruction, pending completion, of the thing sold: but the agreement may nevertheless be specifically enforced (*m*). If, however, land be sold subject to the express or implied condition, not warranted to be fulfilled, that

(*g*) See Benjamin on Sale, 455, 456, 2nd ed.

(*h*) *Elliott v. Cutchley*, 1901, 1 K. B. 565, 568—570, affirmed, 1906, A. C. 7.

(*i*) Above, p. 1011.

(*k*) *Taylor v. Caldwell*, 3 B. & S. 826; *Howell v. Coupland*, 1 Q. B. D. 258; above, p. 507, n. (*r*).

(*l*) Above, pp. 504—508.

(*m*) Above, p. 507.

the land shall be delivered over on completion in some particular state, the proviso is impliedly annexed, that if without the vendor's fault it shall become impossible for him to deliver possession of the land in that state, the further performance of the contract shall be excused (*n*). Thus, if a theatre, music-hall, hotel, public-house, or shop were sold with possession to be given on a future day fixed for completion (*o*), on condition (without warranty) that the premises should be delivered over in a fit state for giving performances or carrying on business therein; or if the vendor had agreed to erect some buildings on the land sold by the day fixed for completion, time being of the essence of the contract, and the premises or buildings were accidentally burnt down a few days before the time for completion, the parties would be discharged from further performance of the contract (*p*). And the same doctrine is applicable, not only where it is an essential term of the contract that the property sold shall be handed over on completion in its existing state or in some other particular state, but in every other instance where land is sold subject to some condition, which is contemplated but not warranted to be fulfilled at the time of completion, and before completion the fulfilment of this condition is rendered impossible by some extraneous cause beyond the control of the parties themselves (*q*). Thus, if a house were sold on the express or implied condition that the King's coronation procession should pass in front of its windows on the day after that fixed for completion, and before completion the King were to die or the route of the procession were to be altered by authority, the contract

The doctrine is applicable to any condition subject to which land is sold, and which becomes an impossible condition.

(*n*) See *Taylor v. Caldwell*, 3 B. & S. 826, 833, 834; *Appleby v. Myers*, L. R. 2 C. P. 651; *Robinson v. Davison*, L. R. 6 Ex. 269; *Howell v. Coupland*, 1 Q. B. D. 258; *Nickoll & Knight v. Ashton*,

Edridge & Co., 1901, 2 K. B. 126.

(*o*) See above, pp. 488, 576.

(*p*) *Caunter v. Macpherson*, 5 Moore, P. C. 53, 104, 105; *Taylor v. Caldwell*, 3 B. & S. 826.

(*q*) Above, *n. o.*

would be discharged for impossibility of performance (*r*). Where a condition of this kind is not plainly expressed, the question, whether it is to be implied, must be determined by reference to the terms of the whole contract and the circumstances of the case (*s*).

Impossibility
of performance
owing to
a change in
the law.

Similarly, a contract may be discharged where its performance is rendered impossible owing to a change in the law (*t*). Thus, if it were a term of a contract to sell land that the vendor should enter into covenants restrictive of the use of some adjoining land of his, and the sale were completed and the covenants entered into accordingly, and afterwards the adjoining land were taken by a railway company under their parliamentary powers, the vendor would be discharged from all further liability on the covenants by reason of the impossibility of performance, the land having been handed over by a cause beyond his control to a body not bound by the covenants (*u*). Suppose, however, that the house or the adjoining land were taken by the railway company after the formation of the contract but before its completion (*x*), the case would be governed by the general rule (*y*), unless the continued existence *in statu quo* of the whole property sold up to the time for completion were an essential condition of the sale. If not, the purchaser would have to pay the whole purchase money and take a conveyance of the property in its altered condition, but he would be entitled to compensation

(*r*) *Krell v. Henry*, 1903, 2 K. B. 740.

(*s*) Cf. *Herne Bay, &c. Co. v. Hutton*, 1903, 2 K. B. 683, with *Krell v. Henry*, *ib.* 740.

(*t*) See above, pp. 866, 867.

(*u*) *Baily v. De Crespigny*, L. R. 1 Q. B. 180; and see *Kirby v. School Board for Harrogate*, 1896, 1 Ch. 437; above, p. 492, n. (*u*).

(*v*) For the purpose of ascer-

taining the time at which lands are taken under the Lands Clauses Act, 1845, the crucial date is that of service of the notice to treat; *Mercer v. Liverpool, &c. Ry. Co.*, 1903, 1 K. B. 652, 1904, A. C. 461; *Dawson v. Great Northern, &c. Ry. Co.*, 1904, 1 K. B. 277, 278, n., 1905, 1 K. B. 260, 273.

(*y*) Above, p. 1018.

from the railway company in respect of his equitable estate or interest in the land compulsorily taken (z). Where it is an essential condition of the sale that the property shall be conveyed in its existing state, it appears that the contract will be discharged, if before completion the whole or any part thereof be taken away compulsorily under parliamentary powers.

When the obligation to carry out a contract partly performed is discharged in this way for impossibility of performance, the parties (in the absence of stipulation to the contrary) are not entitled to be restored to their former position, but are left to remain as they are, as in the case of an illegal or a void contract partly executed (a); and any money paid or property transferred under the contract previously to the discharge so caused cannot be recovered back (b). But obligations arising from the *breach* prior to this discharge of some part of the contract are unaffected and remain enforceable (c). Thus, if a music-hall be sold with possession to be given on a future day, on condition that it shall then be in a fit state for giving performances therein, a deposit of 20 per cent. of the purchase money to be paid to the vendor on signing the contract, and the deposit be paid and the house be accidentally burnt down before the day for completion, the parties would be discharged from further performance of the con-

Position of the parties where a contract partly performed is discharged for impossibility of performance

(z) See *Martin v. London, Chatham & Dover Ry. Co.*, L. R. 1 Ch. 501; *Re King's Leasehold Estates*, L. R. 16 Eq. 521; *Furness Ry. Co. v. Cumberland, &c. Bdg. Socy.*, 52 L. T. 144, 146; *Birmingham, &c. Land Co. v. London & North Western Ry. Co.*, 40 Ch. D. 268; *Long Eaton, &c. Co. v. Midland Ry. Co.*, 1902, 2 K. B. 574. A right to compensation under the Lands Clauses Act, 1845, for one's lands being

injuriously affected is assignable: *Dawson v. Great Northern, &c. Ry. Co.*, 1905, 1 K. B. 260.

(a) Above, pp. 860, 863.

(b) *Civil Service Co-op. Socy. v. General Steam Navigation Co.*, 1903, 2 K. B. 756; and see *De Silvale v. Kendall*, 4 M. & S. 37; *Byrne v. Schiller*, L. R. 6 Ex. 319.

(c) *Chandler v. Webster*, 1904, 1 K. B. 493.

tract (*d*); but the vendor would be entitled to retain the deposit. And if the deposit had not been paid as agreed, the vendor would be entitled to sue for it (*e*). If in such a case the deposit were paid to a third person as stakeholder pending completion, it is thought that, on the discharge of the contract for impossibility of performance, the purchaser would be entitled to recover it (*e*). Where the parties have in effect expressly stipulated that, in case of the impossibility of fulfilling the condition the contract shall be rescinded *ab initio*, it appears that they would be impliedly entitled to *restitutio in integrum* (*f*).

Discharge in consequence of bankruptcy since the contract.

1. Disclaimer by the trustee.

2. Rescission by the order of the Court in Bankruptcy.

3. Composition or scheme of arrangement.

Discharge of the obligation of a contract, before breach, may also be effected in consequence of the bankruptcy since the formation of the contract of one of the parties thereto. This may take place (1) by the disclaimer of the contract, as unprofitable, by his trustee in the bankruptcy; when the liability of the bankrupt and of the trustee under the contract is determined, but the other party is deemed to be a creditor of the bankrupt to the extent of the injury he suffers by the operation of the disclaimer, and may prove the same as a debt in the bankruptcy (*g*). (2) By the rescission of the contract by order of the Court, which may be made in the bankruptcy on the other party's application, and on such terms as to the Court may seem equitable, and under which any damages made payable to the other party may be proved by him as a debt in the bankruptcy (*h*). (3) By the effect of a composition or scheme of arrangement accepted and approved by the Court under the

(*d*) Above, p. 1019.

(*e*) It is thought that this case is parallel to that of money paid to a stakeholder to be applied under an illegal or a void contract, which is not performed; above, pp. 863, 864.

(*f*) Above, p. 1016, and n. (*b*).

(*g*) Stat. 46 & 47 Vict. c. 52, s. 56 (1, 2, 7); *Re Hooley*, 1899, 2 Q. B. 579; see above, pp. 544—547, 552, 554—556.

(*h*) Stat. 46 & 47 Vict. c. 52, s. 56 (5); above, p. 555.

Bankruptcy Act, 1890 (*i*). And (4) by the operation of an order of discharge obtained by the bankrupt (*k*). As we have seen, in the case of a contract to sell land, the purchaser's liability to pay the price may be disclaimed by his trustee in bankruptcy, and will be extinguished by an order for his discharge (*l*); and in either of these cases the vendor is discharged from his obligation to convey, to the performance of which the payment of the price is a condition precedent (*m*). But the vendor's obligation to convey the land sold, so far as it is capable of being specifically enforced in equity, cannot, as a rule, be disclaimed in his own bankruptcy (*n*), and is not released by an order made therein for his discharge (*o*).

ment approved by the Court.

4. Order of discharge.

A contract is discharged by performance of the obligations thereby undertaken; and each particular obligation of the contract is discharged by its performance in due course. Thus, we have seen that, on a sale of land, when the vendor has, by furnishing the proper abstract and producing the right evidence in support of it, shown a good title according to the contract, the purchaser is bound to accept the title (*p*). And when, after acceptance of the title, the vendor has duly conveyed the land sold pursuant to the contract, and the purchaser has paid the price, the parties are, as a rule, discharged from all the obligations of their contract of sale; for nothing else remains to be done on either side (*q*). But the completion of a contract

Discharge of the contract by performance.

Discharge on completion.

(*i*) Stat. 53 & 54 Vict. c. 71, s. 3 (12); above, p. 545 and n. (*g*).

(*k*) Stat. 46 & 47 Vict. c. 52, ss. 30, 37; *Barnett v. King*, 1891, 1 Ch. 4; above, p. 545.

(*l*) Above, pp. 545, 552.

(*m*) Above, p. 578.

(*n*) Above, p. 546.

(*o*) Above, p. 545; *Re Reis*, 1904, 2 K. B. 769, 777, 781, 787.

(*p*) Above, pp. 35, 46, 163, 166, 575, 579; and see *Soper v. Arnold*, 37 Ch. D. 96, 14 App. Cas. 429, stated above, p. 580, where the purchaser, through his legal adviser's inadvertence, expressly accepted a title which was bad on the face of the abstract. Cf. above, pp. 179—182.

(*q*) Above, pp. 578, 611, 617, 653, 654, 730, 812—815.

Completion may not discharge every obligation of the contract.
Collateral stipulation.

Express agreement to compensate for errors.
Warranty of quality.
Collateral agreement restrictive of the use of land or to lay out money thereon.

Breach of an implied collateral obligation.

Breach of vendor's duty to take care of the land sold ;

or to discharge the outgoings.

for the sale of land, by conveyance and payment of the purchase money, does not necessarily operate as a discharge of every liability arising under the parties' agreement. If the contract contain any stipulation, which is collateral to the main duties of proving title, conveyance and payment, the obligation so incurred is not discharged by the performance of those duties. Thus, an express promise contained in the contract to compensate for errors of description (*r*), and a warranty of quality (*s*), remain enforceable after the sale has been completed. So, also, a collateral agreement that the purchaser, his heirs and assigns, shall observe restrictions in the use of the land sold, or that the vendor and his successors in estate shall observe restrictions in the use of other land, or that the purchaser shall build a house or wall, or erect a fence on the land sold, or keep an adjoining road in repair (*t*), is not discharged by conveyance (*u*). It appears, too, that where there has been a breach, before completion, of some obligation implied by law in the contract of sale, but collateral to the main duties thereby undertaken, the liability for this breach is not discharged by conveyance of the land sold in exchange for payment of the price. Thus, it has been held that the purchaser may maintain an action against the vendor, after completion, for breach of the vendor's implied obligation to take proper care of the land sold in the interval between the date of the contract and that of completion (*x*). And it seems that the same principle should be applicable in case of the vendor's breach of his implied obligation to discharge the outgoings up to the day fixed for completion (*y*). It is

v. Palmer v. Johnson, 13 Q. B. D. 351; above, pp. 65, 66, 611, 727—732.

(*s*) *De Lassalle v. Guildford*, 1901, 2 K. B. 215; above, pp. 611, 764, 769, 811, 815, 820, n. (*t*).

(*r*) See above, pp. 491—494.

(*u*) Above, pp. 493, 494, 647—649, and cases there cited.

(*x*) *Clarke v. Ramuz*, 1891, 2 Q. B. 456; above, pp. 512, 523, n. (*y*).

(*y*) Above, pp. 513, 520, 523, and n. (*q*).

thought that an obligation, express or implied, may be said to be collateral to the main duties arising under the contract when it is of such a nature that it cannot reasonably be supposed that the parties intend it to be extinguished by performance of those duties (*z*).

Where the contract contains some collateral stipulation, which is directed or may be required to be inserted in the deed of conveyance, such as a stipulation restrictive of the use of the land sold or other land (*a*), and the stipulation is by mutual mistake modified in or omitted from the conveyance, the party injured thereby is entitled in equity to have the deed of conveyance rectified accordingly and to obtain at once the same relief, in the way of injunction or otherwise, as if the deed had duly expressed the parties' true intention (*b*). But where the parties have by agreement subsequent to the contract modified their original intention, and the deed of conveyance truly expresses their intention as so modified, there is no case for rectification (*c*) ; and since the parties have expressed their true intention in the deed, it is no objection that the agreement modifying their original intention was not otherwise put into writing (*d*). If, however, other persons than the vendor and purchaser were in effect parties to the original contract, so that the vendor and purchaser alone have no power to modify its provisions, as where a building estate is sold in lots on the terms that all purchasers shall have the benefit of certain restrictive stipulations, then the vendor and any single purchaser can only vary the original contract as between themselves and their representatives or successors in estate, and remain bound

Variation or omission of collateral stipulation intended to be inserted in the conveyance.

(*z*) See cases cited in notes (*r*), 803, 804.
 (*s*), (*x*), above, p. 1024. (*r*) Above, pp. 784—786, 800, 801.
 (*a*) Above, pp. 647—649, 666.
 (*b*) Above, pp. 780 *sq.*, 787, (*d*) See above, p. 1013.

by and can enforce the provisions of the original contract as regards all the other parties thereto (*e*).

Completion
without pay-
ment of the
price.

Vendor's lien.

Waiver or
abandonment
of lien.

Express :

Of course, completion of the purchase does not extinguish the contract of sale where it takes place, by the parties' arrangement, without payment of the whole or some part of the purchase money. In that case the amount unpaid remains owing to the vendor as a debt due upon the contract of sale (*f*); and the vendor has also an equitable lien on the land sold for the amount due, with interest thereon at the rate of 4*l.* per cent. per annum (*g*). This lien is no more than the continuance of that arising in equity on formation of the contract of sale (*h*); the lien being allowed to remain in equity until payment, notwithstanding that the vendor has parted with the legal estate by conveyance, and that in the deed of conveyance the whole consideration money is expressed to have been paid (*i*). The vendor may, however, waive or abandon his lien for the unpaid purchase money, and his intention to do so may be either expressed or implied from the circumstances of the case. An express waiver or release of the lien

(*e*) *Rowell v. Satchell*, 1903, 2 Ch. 212; and see above, p. 497.

(*f*) *Consider Evans v. Tweedy*, 1 Beav. 55.

(*g*) *Chapman v. Towner*, 1 Vern. 267; *Pollerfen v. Moore*, 3 Atk. 272; *Mackreth v. Symmons*, 15 Ves. 329.

(*h*) Above, p. 506, and n. (*m*); *Smith v. Hubbard*, 2 Dick. 730; *Topham v. Constantine*, Tambl. 135; *Toft v. Stephenson*, 7 Hare, 1, 1 De G. M. & G. 28, 5 De G. M. & G. 735. The first and last of these cases illustrate the enforcement of the vendor's lien, where the purchaser has been let into possession, but no conveyance has been executed.

(*i*) A receipt for the whole price in the body of the deed estopped

the vendor from proving non-payment at common law; *Baker v. Dewey*, 1 B. & C. 704; *Harding v. Ambler*, 3 M. & W. 279; but not in equity; *Coppin v. Coppin*, 2 P. W. 241; *Wilson v. Keating*, 28 L. J. Ch. 895; *Re Stucley*, 1906, 1 Ch. 67, 79; and cases cited in last note but one. As all branches of the High Court now have equitable jurisdiction, such estoppel by deed at law has practically ceased to exist. An endorsed receipt (see above, p. 695 and nn. (*c*), (*f*)) worked no estoppel either at law or in equity; at law it was only evidence for a jury, and might be rebutted; *Lampson v. Corke*, 5 B. & A. 606, 611, 612; *Re Stucley*, ubi sup.

presents no difficulty: but it must be made either by deed or for valuable consideration; for a gratuitous promise or assurance of waiver or abandonment of the lien appears to be of no avail, if not given under seal (*k*). As the benefit of the lien appears to be assignable by parol only, and to pass by an assignment, valid in equity, of the unpaid purchase money (*l*), it seems that an agreement for waiver or abandonment of the lien need not be put into writing, if made for valuable consideration. Where such waiver or abandonment is sought to be implied, the *onus* lies on those who deny the existence of the lien, which arises by the rule of equity in the absence of stipulation to the contrary; the question is one of the parties' intention, to be determined by the documents they have executed and the circumstances of the case; and the test is, whether they have in effect agreed that the vendor shall have some other security or mode of payment in substitution for his lien (*m*). For example, the vendor's lien is not in general affected by the fact that he has accepted the purchaser's bill of exchange or promissory note, or taken his bond for payment of the amount due, even though such payment be thereby postponed to a future day, or some other party join in the security as a surety for the purchaser's payment; for these are only modes of payment and are not a substitute for the lien (*n*). But if the sale were made on the terms of

or implied.

(*k*) Above, pp. 3, 1010; *Re Hancock*, 57 L. J. Ch. 793; *Edwards v. Walters*, 1896, 2 Ch. 157, 168, 172; and see Wms. Pers. Prop. 232, n. (*l*), 16th ed.

(*l*) *Dryden v. Frost*, 3 My. & Cr. 670, 672–674. The assignee takes subject to the purchaser's right to have the estate conveyed to him free from incumbrances, or otherwise as specified in the contract, and to all prior incumbrances created by the vendor on the land sold; *Lacey v. Ingle*, 2

Ph. 413; above, p. 478, n. (*z*).

(*m*) *Mackreth v. Symmons*, 15 Ves. 329, 340–350; *Winter v. Anson*, 3 Russ. 488, 490–492; *Parrott v. Sweetland*, 3 My. & K. 655; *Re Albert, &c. Co.*, L. R. 11 Eq. 164, 178, 179; *Re Brentwood, &c. Co.*, 4 Ch. D. 562; 2 Dart. V. & P. 829, 6th ed.; 733, 7th ed.

(*n*) *Grant v. Mills*, 2 V. & B. 306; *Winter v. Anson*, 3 Russ. 488; *Collins v. Collins*, 31 Beav. 347.

the purchaser's giving a bond for a certain sum to be void on the performance of a particular condition, so that the giving of the bond and not the payment of the sum thereby secured was the consideration for the conveyance, the vendor would have no lien (*o*). And an intention to exclude the vendor's lien has been implied where he took a mortgage of the land sold to secure a part of the unpaid purchase money (*p*), where he took a mortgage on part of the land to secure the whole sum remaining unpaid (*q*), where payment of the purchase money was to be secured by a transfer of stock redeemable on payment (*r*), and where payment of the price was to be made partly in shares of a company and partly out of moneys to be received by the company from the sale of shares or from loans made to them (*s*). The vendor has a lien, in the absence of stipulation to the contrary, where the price is payable by instalments (*t*), or the sale is made in consideration of the payment of an annuity (*u*): but not if the parties' intention appear to be that there shall be no such lien (*x*).

Lien on land taken under the Lands Clauses Act, 1845.

Where land is taken by agreement or compulsorily under the Lands Clauses Act, 1845 (*y*), the vendor has the like lien as in the case of an ordinary sale, and not

(*o*) *Parrott v. Sweetland*, 3 My. & K. 655; *Dixon v. Gayfere*, 1 De G. & J. 655; and see *Clarke v. Royle*, 3 Sim. 499; *Re Athert, &c. Co.*, L. R. 11 Eq. 164, 178, 179.

(*p*) *Bond v. Kent*, 2 Vern. 281.

(*q*) *Capper v. Spottiswoode*, Taml. 21.

(*r*) *Nairn v. Prowse*, 6 Ves. 752; see *Mackreth v. Symmons*, 15 Ves. 329, 348.

(*s*) *Re Brentwood, &c. Co.*, 4 Ch. D. 562.

(*t*) *Nives v. Nives*, 15 Ch. D. 649.

(*u*) *Tardiffe v. Scrughan*, cited 1 Bro. C. C. 423; *Buckland v. Pocknell*, 13 Sim. 406, 412; *Matthew v. Bowler*, 6 Hare, 110; *Dixon v. Gayfere*, 1 De G. & J. 655, 662.

(*x*) *Mackreth v. Symmons*, 15 Ves. 329, 350—354; *Buckland v. Pocknell*, *Dixon v. Gayfere*, ubi sup.; *Jersey v. Briton, &c. Co.*, L. R. 7 Eq. 400.

(*y*) Stat. 8 & 9 Vict. c. 18.

only for the price of the land, but for all compensation money payable to him (z).

A vendor's lien on the land sold for unpaid purchase money is not required to be registered by the Middlesex Registry Acts; nor was such registration necessary under the old Yorkshire Registry Acts (a). But by the Yorkshire Registries Act, 1884 (b), no lien on any lands in Yorkshire in respect of any unpaid purchase money shall have any effect or priority against any assurance for valuable consideration which may be registered under this Act, unless and until a memorandum of such lien or charge has been registered in accordance with the Act. Where a sale of land situate in a compulsory registration district is to be completed (c) without payment of the whole price, the vendor must take care to have his vendor's lien entered on the register as an incumbrance prior to registration (d); for if this be not done, it appears that the lien will be extinguished on the purchaser's registration as proprietor with an absolute title. The lien will, however, remain unaffected by registration of the title, if the purchaser be registered as proprietor with a possessory title only, or with a qualified title excepting the vendor's lien, or (in the case of a sale of leaseholds) with a good leasehold title (e). But as all such titles may be subsequently turned into an absolute title (f),

Vendor's lien on lands in Middlesex or Yorkshire.

On land situate in a compulsory registration district.

(z) *Walker v. Ware, &c. Ry. Co.*, L. R. 1 Eq. 195; *Wing v. Tottenham, &c. Ry. Co.*, L. R. 3 Ch. 740; *Allgood v. Merrybent, &c. Ry. Co.*, 33 Ch. D. 571; see above, p. 1020. But the lien does not extend to the costs of an arbitration, by which the purchase money has been ascertained; *Ferrers v. Stafford, &c. Ry. Co.*, L. R. 13 Eq. 524.

(a) *Kettlewell v. Watson*, 26 Ch. D. 501, 507.

(b) Stat. 47 & 48 Vict. c. 54,

s. 7; *Buttison v. Hobson*, 1896, 2 Ch. 403, 412; above, pp. 373 sq.

(c) Above, pp. 380 sq.

(d) See Land Transfer Rules, 1903, Nos. 7, 8, 175—181; L. T. R. 1908, No. 43.

(e) Stat. 38 & 39 Vict. c. 87, ss. 7—9, 13, 29—35, 38; Land Transfer Rules, 1903, rr. 52—57, 140—143; Wms. Real Prop. 643 sq., 21st ed.

(f) See Land Transfer Rules, 1908, No. 27.

the only safe course is to register the vendor's lien in all cases.

Against
whom the
vendor's lien
is enforceable.

Where the
vendor has
put it in the
purchaser's
power to
dispose
absolutely of
the land.

The vendor's lien, like other equitable interests (*g*), is enforceable, as a rule, against all persons who claim under the purchaser's estate in the land sold, either for a legal estate or interest by operation of law, by gratuitous assignment, or as purchasers for value with notice of the lien, or for an equitable estate or interest (*h*); but not against any person who has acquired a legal estate or interest in the land sold in good faith as purchaser for value without notice of the lien (*i*). But if the vendor execute a conveyance containing a statement of payment and receipt of the whole purchase money, and allow the purchaser to have the custody of this deed and the other title deeds without obtaining payment of the price, he has put it in the purchaser's power to deal with the land as his own; and it has been held on this ground that a vendor, who so acted, had an inferior claim on the land to an equitable mortgagee from the purchaser by deposit of the title deeds; for the mortgagee was entitled to rely on the statement of payment of the whole price, and the vendor was estopped, as against him, from asserting the untruth of the representation so made (*k*). So, where a vendor joined with the purchaser in executing a mortgage of the land sold (*l*), and where he executed a conveyance for the express purpose of enabling the purchaser to raise money by mortgage (*m*), it was held that he could not assert any lien for unpaid purchase

(*g*) Above, pp. 565 sq.

(*h*) *Mackreth v. Symmons*, 15 Ves. 329, 337, 349; *Care v. Care*, 15 Ch. D. 639, 646—649; *Kettlewell v. Watson*, 26 Ch. D. 501, 508; *Wilson v. Kelland*, 1910, 2 Ch. 306.

(*i*) *Smith v. Evans*, 28 Beav. 59.

(*k*) *Rice v. Rice*, 2 Drew. 73, 85; *Kemmer v. Webster*, 1902, 2 Ch. 163, 173, 174; above, pp. 695, n. (*f*), 744, 938.

(*l*) *Coad v. Pollard*, 9 Price, 544, 10 Price, 109.

(*m*) *Smith v. Evans*, 28 Beav. 59.

money against the mortgagee. And where, under the old Yorkshire Registry Acts (*n*), vendors of land in Yorkshire had executed a conveyance and allowed it to be registered with the object of enabling the purchaser to re-sell the land in lots, and the conduct of their solicitor, to whom they left everything, was such as to induce sub-purchasers to believe that the purchaser had full power to deal with the land, it was held that they could not assert their lien for unpaid purchase money as against sub-purchasers taking an equitable estate in the land without notice of the vendors' intention to insist on their lien (*o*).

If the vendor execute a conveyance to the purchaser without receiving payment of the whole price, he has no lien at common law authorising him to retain possession of the title deeds (*p*). It, appears, however, that his equitable lien on the land sold gives him the right to keep the title deeds until payment (*q*). As we have seen (*r*), the vendor is entitled to retain possession and defer conveyance of the land sold until payment of the whole price; and if he propose to make conveyance on payment of part only, he should, before parting with his estate in the land sold, make such stipulation as he desires concerning the custody of the title deeds, including the conveyance itself, pending full payment. And he should not forget that, if before the price is paid he allow the purchaser to have possession of the title deeds, including a conveyance from himself containing a receipt for the purchase

Vendor
executing
conveyance
without pay-
ment has no
common law
lien on the
title deeds.

(*n*) Above, pp. 373, n. (*g*), 1029.
(*o*) *Kettlewell v. Watson*, 26 Ch. D. 501.

(*p*) *Goode v. Burton*, 1 Ex. 189; see above, p. 680.

(*q*) *Dryden v. Frost*, 3 My. & Cr. 670, 672, 673. This authority seems to have escaped the notice of the editors of Dart,

V. & P. 6th ed. (see p. 826; 731, 7th ed.), or they would hardly have altered the statement in 2 Dart, V. & P. 731, 5th ed. It appears, indeed, to have been overlooked by Dart himself, and Sugden too; see Sug. V. & P. 434, 565.

(*r*) Above, pp. 578, 579.

money in full, he puts it in the purchaser's power to create, not only legal estates or interests, but also equitable charges, which will exclude or have priority over his vendor's lien (*s*). On the other hand, if the unpaid vendor retain all the title deeds in his own possession, a subsequent purchaser or mortgagee from the purchaser will be affected with notice of the lien, if he omit to make inquiry for the deeds, and so will be postponed to the vendor's claim, notwithstanding that he have acquired the legal estate (*t*).

How the lien
is enforceable.

The vendor's lien for unpaid purchase money, after execution of a conveyance to the purchaser, does not entitle him to resume possession of the land sold (*u*), nor does it authorise him to sell the land so charged (*x*). His only remedy to enforce the lien appears to be to apply to the Court, under its equitable jurisdiction, for a declaration of charge and an order for sale to raise the amount due (*y*). If, however, the order for sale prove ineffectual, the property being unsaleable at any adequate price, the Court may then make an order directing the vendor to be again let into possession thereof (*z*).

(*s*) Above, p. 1030.

(*t*) *Worthington v. Morgan*, 16 Sim. 547; *Oliver v. Hinton*, 1899, 2 Ch. 261. But if he make inquiry for the deeds and receive a reasonable excuse for their non-production, he will not be affected with notice of the lien; *Howitt v. Loosenore*, 9 Hare, 449; and see *Hunt v. Elnes*, 2 De G. F. & J. 578; *Ratcliffe v. Barnard*, L. R. 6 Ch. 652; *Manners v. Mor*, 29 Ch. D. 725, 733.

(*u*) *Munn v. Isle of Wight Ry. Co.*, L. R. 5 Ch. 414, 416, 419; *Williams v. Aylesbury, &c. Ry. Co.*, 28 L. T. N. S. 547, 21 W. R. 819; *Allgood v. Merrybent, &c.*

Ry. Co., 33 Ch. D. 571, 574. As in the case of a sale of goods, the vendor, after conveyance of the property, is not entitled to rescind the contract for the purchaser's failure to pay the price; *Benjamin on Sale*, 622, 2nd ed.

(*x*) Above, p. 53; and see *A.-G. v. Sittingbourne, &c. Ry. Co.*, L. R. 1 Eq. 636.

(*y*) Above, pp. 53, and n. (*b*), 471, n. (*a*); *Mackreth v. Symmons*, 15 Ves. 329; *Ecclesiastical Commrs. v. Pinney*, 1899, 2 Ch. 729, 1900, 2 Ch. 736, *Seton on Judgments*, 2290, 2291, 6th ed.

(*z*) *Allgood v. Merrybent, &c. Ry. Co.*, 33 Ch. D. 571.

If one advance money in payment for land, which another is under contract to buy, he is entitled by subrogation to the same lien which the vendor would have had if the price had remained unpaid (*a*). Thus, where an undischarged bankrupt bought land, and his solicitor paid part of the purchase money for him, it was held that the solicitor should have a lien for the amount so paid, in priority to the claims of the trustee and creditors in the bankruptcy (*b*).

Subrogation to vendor's lien of person advancing the purchase money.

Where a conveyance has been executed without payment of the whole price, the purchaser is entitled in equity to set off against the unpaid purchase money any sums of money expended by him in the discharge of incumbrances subsequently discovered, which were created by the vendor himself or comprehended in the vendor's covenants for title (*c*). And the purchaser is of course entitled to assert the same right as against any assignee of the unpaid purchase money (*d*), unless, in view of the assignment of the debt, the assignee had made inquiry of him as to the state of account between him and the vendor, and had received in answer an admission that the whole amount was owing (*e*). But if any incumbrance discovered subsequently to the conveyance were created under title paramount to the vendor's, and were not within the guarantee provided by his covenants for title (*f*), it appears that the purchaser has no right to withhold payment of any part of the purchase money on that account (*g*), unless the sale

Where the discharge of incumbrances discovered after conveyance may be set off against unpaid purchase money.

a *Moss v. Smith*, 11 Sim. 410, 427; *Brooklesby v. Temperance, &c. Socy.*, 1895, A. C. 173, 182, 185; *Thurston v. Nottingham, &c. Bdg. Socy.*, 1902, 1 Ch. 1, 1903, A. C. 6; above, p. 886.

b *Bird v. Philpott*, 1900, 1 Ch. 822.

c *Maynard's case*, 2 Freem. 1; *Treville v. Nash*, 3 P. W. 306;

Sug. V. & P. 552; 2 Dart. V. & P. 804, 805, 5th ed.; 905, 906, 6th ed.; 814, 815, 7th ed.

d Above, p. 758.

e Above, p. 503; 2 Dart. V. & P. 805, 5th ed.; 906, 6th ed.; 814, 815, 7th ed.

f Above, p. 647.

g Consider *Maynard's case*, 2 Freem. 1; *Amos, ib.* 106;

were induced by the vendor's *fraudulent* misrepresentation as to his title or otherwise (*h*).

Remedies
remaining
open after
conveyance.

Here it may be convenient to state shortly what remedies remain open to the parties to a sale of land after completion of the contract by conveyance. These are (1) an action to enforce any obligation which arises out of or is collateral to the contract and is not extinguished by the conveyance of the land (*i*), as to recover any unpaid purchase money or to enforce the vendor's lien in respect thereof (*k*), for breach of a collateral stipulation contained in the contract (*l*), or for breach of a collateral warranty (*m*); (2) an action to rescind the contract for fraudulent misrepresentation (*n*), duress or undue influence (*o*), or on the ground of relative equitable disability (*p*): but not for innocent misrepresentation (*q*); (3) an action of deceit for fraudulent misrepresentation (*r*), or an action to recover damages for duress amounting to a tort (*s*); (4) an action for rectification of the conveyance (*t*); (5) an action to enforce any covenant contained in the deed of conveyance, as upon covenants for title (*u*) or to enforce restrictive covenants (*x*), or a covenant to build, repair, or the like (*y*); (6) an action to enforce any covenant or agreement running with the land sold at law or in equity, as covenants for title entered into by

Thomas v. Powell, 2 Cox, 394;
Walcman v. Rathband, 3 Ves. 233,
235; *contra*, *Anon.*, 2 Ch. Ca. 19;
but this is not law: Sug. V. & P.
551, 552.

(*h*) Above, pp. 654, 806, 811.

(*i*) Above, pp. 1023—1025.

(*l*) Above, pp. 1026, 1032.

(*l*) Above, pp. 65, 66, 611,
1024.

(*m*) Above, pp. 611, 811, 815,
821, n. *q*, 1024, 1025.

(*n*) Above, pp. 806, 811, 831.

(*o*) Above, p. 851.

(*p*) Above, pp. 975 *sq.*

(*q*) Above, pp. 611, 654, 730,
813, 815; *Seddon v. North Eastern*
Salt Co., Ltd., 1905, 1 Ch. 326.

(*r*) Above, pp. 806, 812, 813,
816, 822.

(*s*) Above, p. 853.

(*t*) Above, pp. 640, 641, 644,
651, 665, 787, 803, 804.

(*u*) Above, pp. 611, 644, 648.

(*x*) Above, pp. 491 *sq.*, 666.

(*y*) See above, p. 492.

the vendor's predecessor in estate (*c*), or restrictive covenants made with the vendor or any of his predecessors in title (*a*); (7) an action founded on the legal incapacity of a party to the sale, as by an infant vendor (*b*) or a corporation disabled from selling its land (*c*), to recover the land sold; and (8) an action to rescind the contract, if made under a common mistake of fact (*d*).

§ 2.—*Of Breach of the Contract and Discharge therefrom after Breach.*

A breach of the contract is committed when one of the parties fails to perform some obligation imposed on him by the agreement at the time when it ought to be performed (*e*). The obligations undertaken on a sale of land have been already enumerated (*f*); they consist mainly in the vendor's duty to show a good title and convey the land sold and the purchaser's to pay the price. With respect to the time for performance of these obligations, we have seen that the general rule is that any act necessary to be done by either party in order to carry out the contract must be done within a reasonable time (*g*); and that, although a day be fixed for completion of the contract, time is not in general of the essence of the contract either in equity or, since the Judicature Acts, at law (*h*). It follows that, except where time is of the essence of the stipulation (*i*), a breach of contract is only committed in the case of unreasonable delay in the performance of any act agreed

Breach of the contract.

Time when the contract is broken.

a Sug. V. & P. 551; above, pp. 657—661.

b Above, pp. 491 *sq.*, 496—498.

c Above, p. 884.

d Above, pp. 946 *sq.*

e Above, p. 778.

f Consider *Noble v. Edwards*, 5 Ch. D. 378; *Patrick v. Milner*,

2 C. P. D. 342; *Isaacs v. Smith*, 27 Ch. D. 89, 165, 164; *Pearce v. Marshall*, 1899, 1 Q. B. 710.

g Above, p. 32.

h Above, pp. 48, 49.

i Above, pp. 57—60, 575—578.

j Above, pp. 59, 62, 575—577.

At what time failure to complete a sale of land is a breach of contract.

Service of notice making time essential.

Effect of breach of contract.

to be done (*l*). For example, where time is not essential, a party failing to complete a sale of land on the day fixed therefor by the agreement does not then commit a breach of contract either in equity or at law (*l*); it is only on failure to complete within a reasonable time after that day that the contract is broken (*m*). The result is that, where either party makes delay in performing his part of the agreement, the most prudent course for the other is to serve a notice upon him making time of the essence of the contract, but taking care to allow him a reasonable time, from the date of service of the notice, within which to accomplish the acts he has delayed to perform (*n*). If after service of such a notice the party in default fail to do the required act within the time so limited, the other party will be then entitled to treat the contract as broken (*o*).

The effect of a breach of contract is in every case to give rise to a right of action for debt or damages against the party who commits it, at suit of the other party to the agreement: but the breach may or may not operate to discharge the other from his obligation under the contract, and to give him the option of rescinding or enforcing the contract. This arises from the fact that, according to English law, the duty created by a contract is not an entire and indivisible thing, but may consist of various separate obligations undertaken by one party; and the performance of any of these obligations may or may not be a condition precedent to his

(*l*) Consider *Mackreth v. Marlar*, 1 Cox, 259; *Lloyd v. Collett*, 4 Bro. C. C. 469, 4 Ves. 690, n.; *Fenn v. Cattell*, 27 L. T. 469; *Howe v. Smith*, 27 Ch. D. 89; *Cornwall v. Benson*, 1900, 2 Ch. 298.

(*l*, *Patrick v. Milner*, 2 C. P. D. 342.

(*m*) *Howe v. Smith*, 27 Ch. D. 89, 103, 104.

(*n*) Above, pp. 49, 577.

(*o*) Above, p. 49, and cases there cited.

enforcing the other party's liability (*p*). If the obligation broken be such that its performance by the defaulting party was not essential to his enforcing the contract himself, the other party is not released from his own duty under the contract, and has merely a right of action for the breach. Thus, where a sale of land was made for a price payable by several small instalments, and the purchaser made default in paying the last instalment, it was considered that the vendor was entitled only to sue for the amount due and not to rescind the contract of sale (*q*). And, as we have seen (*r*), the breach of a *pure* warranty, not amounting to a condition, does not give rise to a right to avoid a sale. Breach of an obligation of this kind is no bar to the enforcement of the rest of the contract by the party in default, so long as he offer to perform the stipulation broken when insisting on the other's liability (*s*). But if the performance of the obligation broken be a condition precedent to the liability of the party who is not in default, the breach discharges him from his own obligation of the contract, and gives him the right, at his election, to rescind the contract or to sue upon it for the breach.

*Cornwall v.
Henson.*

This proposition is occasionally summarized as the discharge of the contract by breach; a term which is not perfectly accurate and may mislead a student of law. The contract is not extinguished by the breach; for no one may discharge himself from his contract by breaking it; and the other party may enforce the contract after the breach. The true sense of the expression

Discharge of
a contract by
breach.

p. Above, pp. 808—811
(*q*. *Cornwall v. Henson*, 1900, 2
Ch. 298; and see *Workman,
Clark & Co., Ltd. v. Lloyd Brazileiro*,
1908, 1 K. B. 968.

(*r*) Above, pp. 807, 808.

(*s*) *Cornwall v. Henson*, ubi

sup.; and consider the equitable
doctrine that a contract might
be specifically enforced, notwith-
standing that a stipulation as to
time were broken; above, pp. 57
—60, 575—577.

is that one party to a contract may be discharged from his obligation thereunder by the *other* party's breach of the contract. This doctrine has been already mentioned (*t*); and it comes into operation where the parties' intention, to be gathered from the terms of the whole contract, is that the *performance* by one of them of his part of the contract, or of some particular stipulation contained therein, shall be a *condition precedent* to the other party's liability under the agreement (*u*). In that case, the breach by the one of his duty under the contract or stipulation discharges the other from the obligation of performing his part of the contract; and the other will be immediately entitled at his election either to rescind the contract and sue for the return of any money paid or property transferred by him thereunder, or else to affirm the contract and sue for damages for the breach (*x*). If, however, he choose to affirm the contract and the performance of his own duty thereunder were a condition precedent to the defaulting party's liability, then he must show that he has (so far as possible) performed, or otherwise has offered to perform his own part of his agreement in order to recover damages for the other's breach (*y*). Thus, on a sale of land, the performance by the vendor of his obligation to show a good title is a condition precedent to the purchaser's liability under the contract (*z*); and if this duty be not discharged, the purchaser may at once, without waiting for the day fixed for completion, insist upon the breach and either rescind the contract or treat

^t Above, p. 808.

^u *Hotham v. East India Co.*, 1 T. R. 638, 645; *Belloni v. Gige*, 1 Q. B. D. 183, 186, 187; above, pp. 809, and n. *a*, 1036.

^v *Moses v. Macferlan*, 2 Burr. 1005, 1010 *sq.*; *Seaward v. Wilcock*, 5 East, 198, 202; *Flight v. Booth*, 1 Bing. N. C. 370, 375, 376; *Michael v. Hart*, 1902, 1

K. B. 482, 490; *General Billposting Co., Ltd. v. Atkinson*, 1908, 1 Ch. 537, *affd.*, 1909, A. C. 118; above, p. 809.

^y *Glasbrook v. Woodman*, 8 T. R. 366; *Paul v. Hall*, 6 M. & W. 835; *Lord v. Pim*, 7 M. & W. 474; above, p. 809.

^z Above, p. 32, n. (*b*).

it as broken accordingly (*a*). So, also, the fulfilment of a warranty of quality or any similar warranty or representation by the vendor which has induced the sale is, in general, a condition precedent to the purchaser's liability to carry out the contract; and a breach thereof entitles him to rescind (*b*), or if the stipulation broken be a part of the contract (*c*), to claim damages for the vendor's non-performance of the agreement. And as we have seen (*d*), when the title has been accepted, the stipulations requiring the vendor to convey the land sold and the purchaser to pay the price are dependent on each other; the performance of each is a condition precedent to liability under the other; and if the vendor refuse to convey (*e*), or the purchaser fail to pay (*f*), the other party is discharged from his own obligation under the contract, and may either rescind the agreement for sale or sue for damages thereunder. But if the purchaser fail to pay the price, the vendor affirming the contract cannot recover damages thereunder without proving that he has shown a good title and has offered to convey the land (*g*). So if the vendor should refuse to convey, the purchaser claiming damages for breach

Breach of warranty of quality or similar representation.

Breach of the duty to convey or pay the price.

(*a*) *Haggart v. Scott*, 1 Russ. & My. 293, 295; *Forster v. Nash*, 35 Beav. 167, 171; *Wiston v. Savage*, 10 Ch. D. 736; *Brewer v. Broadwood*, 22 Ch. D. 105, 109; *Lee v. Soames*, 36 W. R. 884; above, pp. 168, 169, 184—187, 190, 191; and see above, pp. 722—728, 762, 763, as to a breach of contract occurring by reason of a deficiency in quantity of the land or estate promised to be conveyed. It is respectfully submitted that the theory put forward by Parker, J., in *Halkett v. Dudley*, 1907, 1 Ch. 599, 596, that this right of the purchaser is not more than an equitable right affecting the equitable remedy by way of specific performance, is erroneous; see above, p. 185, and *n.* (*l*).

b, Above, pp. 764, 766, 769, 807—811, 814, 815, 819, 821; and see *Ellinger v. Matua*, &c. Co., 1905, 1 K. B. 31.

c Above, pp. 807—811, 814.

d Above, pp. 578, 579, 809.

e *Engel v. Fitch*, L. R. 3 Q. B. 314, 4 Q. B. 659; *Hain v. Fothergill*, L. R. 7 H. L. 265, 209; *Dry v. Singleton*, 1839, 2 Ch. 320, 329, 333, 334; and see *Jones v. Gardiner*, 1902, 1 Ch. 191, 195.

f *Poole v. Hall*, 6 M. & W. 835; *Laurd v. Pea*, 7 M. & W. 471; *Soper v. Arnold*, 37 Ch. D. 96, 14 App. Cas. 429.

g *Noble v. Edwards*, 5 Ch. D. 378, 393; above, pp. 809, *n.* (*x*), 1038; see also *Powell v. Marshall*, 1899, 1 Q. B. 710; above, pp. 548, 549.

of the contract must show that he has tendered a conveyance and offered to pay the purchase money (*h*).

Breach of contract by renunciation of performance.

A breach of contract may be committed, not only by the failure to perform some obligation under the contract at the time when it ought to be fulfilled, but also by the renunciation of performance of the contract; and this may occur in two ways. If either party absolutely refuse, or if by his own act he make it impossible for him to carry out his part of the agreement, the other is entitled at his election either to treat such renunciation of performance as a breach of contract, and at once to rescind or sue upon the contract accordingly, or else to treat the agreement as still subsisting, wait till the time is gone by for the renouncing party to perform the acts promised, and then sue him for the breach occasioned by such non-performance (*i*). If the injured party adopt the former alternative, he will be entirely discharged from his own obligation under the contract; so much so, that if he choose to treat the renunciation as a breach and to sue at once for damages in *affirmance* of the contract, he will not be bound to prove the performance of, or any offer to perform, his own part of the agreement, but may recover if the other party's conduct alone prevented him from performing it (*k*). If, on the other hand, he elect not to treat the renunciation as an immediate breach, but to keep the contract open till the time arrives for its performance, the agreement remains

h. See previous note, and *Bennett v. Stone*, 1902, 1 Ch. 226, 236, 1903, 1 Ch. 509, 517, 523, 527.

i. *Hochster v. De la Tour*, 2 E. & B. 678; *De Bernardy v. Harding*, 8 Ex. 822, 824; *Frost v. Knight*, L. R. 7 Ex. 111; *Johnstone v. Mellony*, 16 Q. B. D. 460; *Michael v. Hart*, 1902, 1 K. B. 482; see

also *Oplens, Ltd. v. Nelson*, 1903, 2 K. B. 287, 1904, 2 K. B. 410, 1905, A. C. 109; *General Billposting Co., Ltd. v. Atkinson*, 1908, 1 Ch. 537, aff'd. 1909, A. C. 118.

k. *Port v. Ambergate, &c. Ry. Co.*, 17 Q. B. 127; *Braithwaite v. Foreign Hardwood Co.*, 1905, 2 K. B. 543.

subsisting in the interval for the benefit and at the risk of both parties equally; and if the injured party wait to sue upon the breach occasioned by the ultimate non-performance of the agreement, he must perform or offer to perform all stipulations in the contract, whereof performance is a condition precedent to the other's liability (*l*). Besides which, if he keep the contract alive, the other party will be in the same position as if he had never renounced performance, and may avail himself of any defence to an action for the breach occasioned by his ultimate non-performance of his contractual obligations in the same manner as if he had all along been ready and willing to perform them (*m*). Thus, if the contract were to be performed only in case of the fulfilment of some condition, so that it might be discharged for impossibility of performance (*n*), and after a renunciation, not chosen to be accepted as a breach of contract, but before the time for carrying out the renouncing party's obligations, the conditions were by some extraneous cause rendered impossible of fulfilment, the renouncing party would be excused, equally with the other, from any further performance of the contract. So if by some event occurring during the same interval the completion of the contract were rendered illegal (*o*), the renouncing party would be entitled to take advantage of that defence (*p*). Renunciation of performance of a contract may be made by words or conduct, but in either case the words or acts relied on must amount to an absolute and unqualified repudiation of all intention to complete the contract; otherwise there is no such renunciation as may be treated as a breach (*q*). And if a party renounce

(*l*) Above, p. 1038.

(*m*) *Frost v. Knight*, L. R. 7 Ex. 111, 112; *Michael v. Hart*, 1902, 1 K. B. 482, 490.

(*n*) Above, pp. 1018 *sq*.

(*o*) Above, pp. 866, 857.

(*p*) *Avery v. Bowden*, 5 E. & B. 714.

(*q*) *Avery v. Bowden*, 5 E. & B. 714; *Johnstone v. Milling*, 16 Q. B. D. 460; *Cornwall v. Henson*, 1900, 2 Ch. 298.

performance of some particular stipulation only, and not of his whole duty under the contract, that does not entitle the other to rescind or sue upon the contract as for an immediate breach thereof, unless the particular stipulation were such as goes to the root of the whole consideration, its *performance* being a condition precedent to the renouncing party's right to enforce the agreement (*r*). If one party elect to treat the other's renunciation as a breach of contract, he cannot afterwards recede from this position and claim to treat the contract as subsisting (*s*). And if he definitely claim to treat some words or conduct, which he wrongly supposes to be a renunciation, as a breach of the contract discharging him from his own obligations thereunder, such claim amounts to a renunciation of the contract on his part, and may be so treated by the other party (*t*).

Renunciation
of a contract
to sell land.

These doctrines are illustrated on a sale of land, where, before the day fixed for completion, either party expressly refuses to perform or manifests an absolute and unqualified intention of not performing the contract or some essential part thereof, such as the duty to prove title (*u*), to convey or pay the price, or where the vendor sells and conveys the land to a stranger to the contract (*x*), or lets it to a stranger with an option of purchase (*y*).

Discharge of
the obligation
arising on
breach of
contract.

The obligation arising from breach of the contract—that is, the liability to an action at law at suit of the injured party (*z*)—may be discharged in the following

r *Johnstone v. Milling*, 16 Q. B. D. 460; *Cornwall v. Henson*, 1900, 2 Ch. 298; above, pp. 809, 1037, 1038.
s *Johnstone v. Milling*, ubi sup.; *Smith v. Butler*, 1900, 1 Q. B. 694; above, pp. 829, 1010.

t *Smith v. Butler*, ubi sup.
u *Lloyd v. Collett*, 4 Bro. C. C. 169, 4 Ves. 690, n.
x Above, p. 565, n. (*t*).
y *Cornwall v. Henson*, 1900, 2 Ch. 298.
z Above, p. 1036.

ways:—First, by a release, which, if gratuitous, must be made by deed (*a*). Secondly, by accord and satisfaction, which is the injured party's acceptance of something else in discharge of the liability (*b*). This may, in general, be anything in the way of valuable consideration that he chooses to take (*c*); for, as in other cases, the law leaves the parties to make what bargain they please, and does not inquire into the adequacy of the consideration (*d*). But if the right of action to be discharged be for a certain sum of money (that is, a debt), and not for unliquidated damages (*e*), the well-known rule applies that the acceptance of a smaller sum *of money* than that due is not satisfaction of the whole amount owing (*f*), unless there be some consideration for the discharge of the residue, such as payment at an earlier date than the whole sum is due (*g*), or the concurrence of other creditors in accepting a composition (*h*). According to the general rule, however, the acceptance of a negotiable security (even a cheque) for a smaller amount may be a sufficient satisfaction to extinguish the whole debt, the creditor having chosen to take a valuable thing, which is not *money*, instead of payment (*i*). Where the right of action is for un-

Release of
right of
action.
Accord and
satisfaction.

(*a*) *Edwards v. Walters*, 1836, 2 Ch. 157; Wms. Pers. Prop. 231, 16th ed.

(*b*) Bae, Abr. Accord and Satisfaction; 3 Black. Comm. 15, 16, 306.

(*c*) Litt. s. 344; Co. Litt. 212 b; *Funnel's case*, 5 Rep. 117.

(*d*) Above, pp. 848, 849; *Bainbridge v. Firmstone*, 8 A. & E. 743; *Byles, J., Westlake v. Adams*, 5 C. B. N. S. 248, 265.

(*e*) *Wilkinson v. Byers*, 1 A. & E. 106.

(*f*) *Cumber v. Wane*, 1 Strange, 426; *Fitch v. Sutton*, 5 East, 230; *Foakes v. Beer*, 9 App. Cas. 605; *Underwood v. Underwood*, 1894, P. 204.

(*g*) Co. Litt. 212 b.

(*h*) *Clegg v. Barrett*, 4 C. P. D. 379.

(*i*) *Silove v. Tripp*, 15 M. & W. 23; *Goddard v. O'Brien*, 9 Q. B. D. 57; *Bidder v. Bradys*, 37 Ch. D. 406. As to the effect of the acceptance of a bill or note in discharge of a debt, see *Re a Debtor*, 1908, 1 K. B. 344, and cases there cited. Here it may be noted that, except in the case of an account current of debts and credits or by the effect of the bankruptcy rules as to mutual credits, mutual debts, or mutual dealings, a debt is not discharged by the fact that the creditor owes the debtor an equal sum, notwithstanding that this may be pleaded as a set-off in an action

liquidated damages, the acceptance of any certain sum of money is a sufficient satisfaction (*k*). Under the present law, accord and satisfaction may in all cases be well made without deed, even where the right of action discharged was for a certain sum of money payable under a deed (*l*). Thirdly, by the award of an arbitrator or arbitrators, to whom the matter in dispute has been referred for determination (*m*). But a *debt* cannot be discharged in this way, unless it were referred to arbitration, together with some other matter in controversy and of an uncertain nature (*n*). Fourthly, under the bankruptcy of the party in default, by his

Award on
arbitration.

Bankruptcy.

to recover the debt; Wms. Pers. Prop. 233, 16th ed.; *Re Hiram Maxim Lamp Co.*, 1903, 1 Ch. 70; *Smith v. Betty*, 1903, 2 K. B. 317; *Re Leeds, &c. Co.*, 1904, 2 Ch. 45.

(*k*) *Blake's case*, 6 Rep. 43 b; *Peytoe's case*, 9 Rep. 77 b, 79 b; *Wilkinson v. Byers*, 1 A. & E. 106.

(*l*) The rule of common law was that an obligation contracted by deed to pay a certain sum of money could not be effectually discharged without deed; but in

equity such an obligation might be discharged by accord and satisfaction made without deed; and since the Judicature Acts the rule of equity prevails in this respect; *Steeds v. Steeds*, 22 Q. B. D. 537; above, p. 1011. For the old law, see *Nichols' case*, 5 Rep. 43; *Blake's case*, 6 Rep. 43 b; *Peytoe's case*, 9 Rep. 77, 79; *Preston v. Christmas*, 2 Wils. K. B. 86; Doctor & Student, Dial. 1, c. 12; stat. 4 & 5 Anne, c. 16, s. 12.

(*m*) Bac. Abr. Arbitrament and Award; 3 Black. Comm. 16, 306; Chitty on Pleading, i. 488, iii. 105, 7th ed. Written agreements to submit present or future differences to arbitration are now governed by the Arbitration Act, 1889 (stat. 52 & 53 Vict. c. 49). Such an agreement is therein referred to as a submission; sect. 27. By sect. 1, a submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court. By sect. 4, any legal proceedings commenced in any Court by any party to a submission may be stayed at the instance of any other party to the submission on application made at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, provided the Court or a judge thereof be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant has from the commencement of the proceedings been ready and willing to do all things necessary to conduct the arbitration. See *Baker v. Yorkshire, &c. Co.*, 1892, 1 Q. B. 144; *Kitts v. Moore*, 1895, 1 Q. B. 253; *Ford's Hotel Co. v. Bartlett*, 1896, A. C. 1; *Fawdrey v. Simpson*, 1896, 1 Ch. 166; *Zalino v. Hammond*, 1898, 2 Ch. 92; *Richardson v. Le Maitre*, 1903, 2 Ch. 222; *Morrison Tinsplate Co. v. Brooker*, 1908, 1 K. B. 403.

(*n*) Rolle, Abr. 264; Bac. Abr. Arbitrament and Award (A.).

obtaining an order for his discharge or by the creditors' acceptance and the approval by the Court of a composition or scheme of arrangement (*o*). And, fifthly, Judgment. by the injured party pursuing the right of action to judgment, after which the original obligation is, as a rule, merged in the judgment (*p*), and the plaintiff is estopped from suing again upon the same cause of action (*q*).

The right of action upon a contract may also be barred by lapse of time under the Statutes of Limitation; but this does not altogether extinguish the obligation (*r*). For example, a statute-barred debt, though it cannot be pleaded as a set-off (*s*), may be revived by acknowledgment (*t*), may, as a rule, be lawfully paid by an executor or administrator (*u*), or may, in equity, be required to be brought into account before the party liable is allowed to participate in any fund which should

Effect of
Statutes of
Limitation.

(*o*) Above, pp. 545, 1022, 1023.

(*p*) *Expte Fewings*, 25 Ch. D. 338; *Weggy Prosser v. Evans*, 1895, 1 Q. B. 108; *Re King and Bessley*, ib. 189; *Economic, &c. Socy. v. Osborne*, 1902, A. C. 147; and consider *Kendall v. Hamilton*, 4 App. Cas. 504; *Taylor v. Holland*, 1902, 1 K. B. 676, 681; *Morel v. Westmorland*, 1904, A. C. 11.

(*q*) *Slade's case*, 4 Rep. 92, 94b; Chitty on Pleading, i. 488, iii. 107, 7th ed. A judgment by consent has the same operation in this respect as any other judgment: *Re South American, &c. Co.*, 1895, 1 Ch. 37.

(*r*) *Coventry v. Williams*, 3 Hare, 539, 551 sq.; *London and Midland Bank v. Mitchell*, 1839, 2 Ch. 161, 168; *Re Lloyd*, 1903, 1 Ch. 385, 401; Stirling, L.J., *Re Stucley*, 1806, 1 Ch. 67, 81; *Re Bruce*, 1908, 2 Ch. 682, 684, 685.

(*s*) *Remington v. Stevens*, 2

Strange, 1271; stat. 9 Geo. IV. c. 14, s. 4; *Walker v. Clements*, 15 Q. B. 1046; *Dingle v. Coppen*, 1899, 1 Ch. 720; *Smith v. Betty*, 1903, 2 K. B. 317.

(*t*) Bac. Abr. Limitation of Actions (E. 8); *Morgan v. Rowlands*, L. R. 7 Q. B. 493; *Chasemore v. Turner*, L. R. 10 Q. B. 500; *Green v. Humphreys*, 23 Ch. D. 207; *Cosper v. Kendall*, 1909, 1 K. B. 405. Any such acknowledgment unless made by way of payment of some principal or interest due on a debt, must be in writing signed by the party chargeable therewith or his agent; stat. 9 Geo. IV. c. 14, s. 1; 19 & 20 Vict. c. 97, s. 13; Wms. Pers. Prop. 168, 172, 554, 16th ed.

(*u*) See Wms. Pers. Prop. 556, 16th ed.; *Re Wenham*, 1892, 3 Ch. 59; *Midgley v. Midgley*, 1893, 3 Ch. 282.

have been increased by its discharge in due course (*x*). Also, if two persons be mutually indebted, having cross claims against each other, some of which could be met by the plea of the Statute of Limitations, and they come to an agreement as to the sum due from one of them upon a balance of account, that agreement is equivalent to actual payment of the debts, which it purports to extinguish; it is valid as having been for a new and valuable consideration, and cannot be impeached on the ground that some of the items allowed in account were statute barred (*y*). A right of action arising from breach of a contract to sell land is barred, as a rule, in six years after the breach, if the contract were not made by deed (*z*); but if the contract were under seal, then in twenty years (*a*). If, however, any acknowledgment of liability should have been made in signed writing or by payment (*b*), the time runs from the giving of the acknowledgment or the last acknowledgment. And if the party entitled to sue were under the disability of infancy, lunacy or coverture when the cause of action accrued, the time runs from the date of removal of the disability (*c*). If the party liable were beyond seas at the time when the right of action accrued, the period of limitation does not begin to run till his return (*d*). The time for

(*x*) *Courtenay v. Williams*, 3 Hare, 539, 551 *sq.*; *Re Cordwell's Estate*, L. R. 20 Eq. 644; *Re Ahernan*, 1891, 3 Ch. 212; *Re Goy & Co., Ltd.*, 1900, 2 Ch. 149, 153, 154; *Re Wheeler*, 1904, 2 Ch. 66, 71; cf. *Re Bruce*, 1909, 2 Ch. 682.

(*y*) *Ashby v. James*, 11 M. & W. 542; *Turner v. Willis*, 1905, 1 K. B. 468.

(*z*) Stat. 21 Jac. I. c. 16, s. 3.

(*a*) Stat. 3 & 4 Will. IV. c. 42, s. 3.

(*b*) Above, p. 1045, and n. (*l*); stat. 3 & 4 Will. IV. c. 42, s. 5.

(*c*) Stats. 21 Jac. I. c. 16, s. 3; 3 & 4 Will. IV. c. 42, s. 4; 19 & 20 Vict. c. 97, s. 10.

(*d*) Stats. 4 Anne, c. 16, s. 19; 3 & 4 Will. IV. c. 42, s. 4; *Massey Ry v. Gaddan*, 1894, 2 Q. B. 352. But where one of several persons jointly liable was beyond seas, his absence does not prevent the time of limitation from running as against the others not so absent; and the recovery of judgment against them will not bar an action against him on his return; stat. 19 & 20 Vict. c. 97, s. 11.

enforcing the vendor's lien on the land sold (*e*) is now limited to twelve years from the date when a present right to receive the money secured by the lien accrued to some person capable of giving a discharge for the same, or from the date of the last acknowledgment by payment or in signed writing (*f*). The time when the purchase money accrues due for the purposes of this enactment is the date of actual completion, if a conveyance to the purchaser has been executed; but if the purchaser has been let into possession without conveyance, then the time when completion ought to have taken place; that is, when the vendor showed such a title as the purchaser was bound to accept (*g*). And interest on the purchase money does not become due and payable until the principal has become payable; though it may have to be computed from the day fixed for completion (*h*). It appears that, where the contract of sale was made by deed, the right to sue the purchaser personally for the amount due on the vendor's lien is barred within the same time as the lien itself (*i*): though, if the vendor had waived his lien, it appears that the time of limitation would be twenty years (*k*). Where the agreement for sale was a simple contract, the right to sue the purchaser personally for the price is barred at the end of six years (*l*), though the vendor's lien would not be barred until twelve years had elapsed. It appears that a vendor suing to enforce his lien can only so recover six years' arrears of interest due there-

(*e*) Above, pp. 1026, 1033.

(*f*) Stat. 37 & 38 Vict. c. 57, s. 8, replacing 3 & 4 Will. IV. c. 27, s. 40.

g *Toft v. Stephenson*, 7 Hare, 1, 1 De G. M. & G. 28, 5 ib. 735; above, pp. 575, 578, 579.

(*h*) S. C., 5 De G. M. & G. 735; above, pp. 60, 515, 713, 717.

(*i*) Consider *Sutton v. Sutton*, 22 Ch. D. 511; *Fouryside v. Flint*, ib. 579; *Re Frisby*, 43 Ch. D. 106; *Re England*, 1895, 2 Ch. 820; *Shaw v. Crompton*, 1910, 2 K. B. 370.

(*k*) Above, pp. 1026 *sq.*, 1046.

(*l*) *Barnes v. Glendon*, 1890, 1 Q. B. 885.

on (*m*); but that, where the payment of the interest is secured by bond or other specialty, he can recover twelve years' arrears by suing the purchaser personally (*n*).

The equitable right to specific performance of the contract.

It has been mentioned that, as a rule, either party to a contract to sell land is entitled to sue in equity for specific performance of the agreement (*o*). This right is, in general, founded on a breach of the contract, but not in the same manner as the right to sue at law. The Court has no jurisdiction to award damages at law except in case of a breach of the contract (*p*); while the equitable jurisdiction to order an agreement to be specifically performed is not limited to the cases in which at law damages would be recoverable (*q*). At the same time the Court, in exercising its discretion (*r*) to grant this equitable relief, will hardly interfere to coerce a party who is of his own accord duly carrying out the contract (*s*); so that the right to pursue this remedy must in general depend on the defendant's failure or refusal to perform the agreement (*t*). This right is, however, entirely distinct from the right of action arising on breach of the contract at law (*u*). Thus, the equitable right to enforce the contract specifically may

m Stat. 3 & 4 Will. IV. c. 27, s. 42; *Hunter v. Nockolds*, 1 Mac. & G. 649; *Dough v. Coppen*, 1899, 1 Ch. 726, 729, 746; *R. Lloyd*, 1903, 1 Ch. 385, 398, 401.

n Stat. 3 & 4 Will. IV. c. 42, s. 3, as modified by 37 & 38 Vict. c. 57, s. 8; *Sims v. Thomas*, 12 A. & E. 556; and cases cited in note (*i*), above, p. 1047.

o Above, p. 37.

p See above, p. 1035, n. (*e*).

q *Bettesworth v. St. Paul's*, Select Cases, 1. King, 66, 1 Bro. P. C. 240; *Cannell v. Buckle*, 2 P. W. 243, 244; *Leman v. Napper*, 2 Sch. & Lef. 682, 684; *Boss v. Chelley*, Taml. 80, where

a decree for specific performance was made against a defendant who had committed no breach of contract, but the plaintiff was ordered to pay the costs; Fry, Sp. Perf. § 60, p. 26, 3rd ed.; above, pp. 13, 43-45, 722, 723.

r Above, p. 37.

s *Whitmel v. Forrel*, 1 Ves. sen. 256, 258; *Milnes v. Gery*, 14 Ves. 400, 409; *Price v. Puzos Corp.*, 4 Hare, 506.

t See Van Heythuysen's Equity Draftsman, i. 9 *sp.*, 2nd ed.; Fry, Sp. Perf. §§ 3, 4, 47, pp. 3, 20, 3rd ed.

u Above, p. 1036.

be barred by the laches of the person entitled (x), while his right to sue for damages is unimpaired (y). And we have seen that the vendor's liability to be sued for specific performance of the agreement is not destroyed by the vendor's bankruptcy, or any proceedings therein (z).

(i) *Eads v. Williams*, 1 De G. M. & G. 674, 691; *Long v. Staddon*, 1898, 1 Ch. 178, 181, affirmed, 1899, 1 Ch. 5.

in *Cornwall v. Hanson*, 1940,
2 Ch. 298.
- Above, pp. 545, 546, 550,
551, 1023.

CHAPTER XIX.

OF THE REMEDIES FOR BREACH OF THE CONTRACT.

- § 1. Of Rescission and Resale.
- § 2. Of claiming Damages under the Contract.
- § 3. Of Specific Performance.
- § 4. Of a Vendor and Purchaser Summons.
- § 5. Of the Purchaser's Remedies for Disturbance after Completion.

Remedies for
breach of a
contract to
sell land.

WE will now consider the remedies for breach of a contract to sell land. Where the stipulation broken goes to the whole root of the consideration (*a*)—as on breach of one of the main duties of the contract (*b*)—the injured party's remedies are either to rescind the contract and sue for restitution to his former position, or to affirm the contract and sue either for damages for the breach or for the specific performance of the agreement. Besides these remedies by action, it is open to him to adopt the special mode of procedure by vendor and purchaser summons (*c*). Where a breach has been committed of a stipulation which is not essential, the appropriate remedy is usually an action for damages for the particular breach, but that will not preclude any further proceedings which may be necessary to enforce the main duty of the contract either at law or in equity (*d*). In connection with the remedies for breach of the contract, it will be convenient also to consider the purchaser's remedies in case of his ejectment or dis-

a, Above, p. 869.
b, Above, p. 1039.

(*c*) Above, p. 39.
(*d*) Above, pp. 1036, 1042.

turbance after completion. Apart from fraud and common mistake (*e*), and except where the contract contained an express agreement for compensation so worded as to be applicable to the case (*f*), or where the vendor gave an express warranty of his ownership or right to sell the land (*g*), these are to sue upon the vendor's covenant for title, if any (*h*), or to sue upon any other covenants for title of which the benefit runs with the land sold (*i*).

§ 1.—*Of Rescission and Resale.*

It has been pointed out (*k*) that, where either party to the contract commits such a breach of it as discharges the other from his obligation under the agreement, the other is entitled, at his election, either to rescind the contract or to affirm it and sue upon it for damages for the breach (*l*). If he elect to rescind, he is entitled to take active proceedings *in equity* to assert his right and to secure entire restitution (*m*); and he is

Rights of a party rescinding the contract on the other's breach.

(*e*) Above, pp. 611, 654, 778, 805 *sq.*

(*f*) Above, pp. 65, 611, 730—732.

(*g*) Above, pp. 611, 653, 654, 811, 815, 819.

(*h*) Above, pp. 652 *sq.*

(*i*) Above, pp. 659—661; Sug. V. & P. 551.

(*k*) Above, p. 1038.

(*l*) But after the vendor has obtained a decree for specific performance in an action brought

by him for that purpose, the purchaser is not entitled, without the leave of the Court, so to rescind the contract for the vendor's failure to show a good title; and his proper course is to move in the action to be discharged from the contract on that ground; *Halkett v. Dudley*, 1907, 1 Ch. 590, 601, as to which case see above, pp. 166, n. (*n*), 185, 186, n. (*l*), 515, n. (*v*), 1039, n. (*a*).

(*m*) *Mackreth v. Marlar*, 1 Cox, 259; *King v. King*, 1 My. & K. 442. It is submitted that the former of these cases establishes that one entitled to rescind a contract for the other party's breach of it may sue as plaintiff in equity to enforce this right, as in case of rescission for a misrepresentation (above, pp. 811, 813), but must, as a rule, make entire restitution. The question, not contested in that case, of an exception occurring in the case of a deposit, is discussed below, pp. 1054—1057, and n. (*f*). In the latter case (approved in *Hope v. Hope*, 22 Beav. 351, 365) a purchaser let into possession before completion received notice that it was impossible for the vendor to make a good title, but he declined either to quit possession or to accept such title as the vendor could give and pay the purchase money; and it

entitled to sue *at law*, independently of the contract, to recover any money paid or property transferred by him thereunder (*u*), and also, it seems, to recover any money necessarily expended by him in discharging any obligation imposed on him by the agreement (*o*). Thus a purchaser rescinding the contract for the vendor's failure to show a good title may recover his deposit, if any, or any other sum paid on account of the purchase money, together with interest thereon at four per cent. per annum (*p*); and a vendor who has delivered over

was held, as he would not accept the latter alternative, that he must give up possession and account for all rents and profits received by him. *A fortiori*, it is thought, a vendor rescinding for the purchaser's breach of contract and not being himself in default must be entitled in equity to exact the like restitution as he is bound to make. The right of the injured party to sue as plaintiff for rescission of the contract and consequent reimbursement of expenses incurred was recognised and enforced in *Weston v. Sarage*, 10 Ch. D. 736, where it was claimed that the agreement was void and ought to be delivered up to be cancelled (a relief given under the Court's equitable jurisdiction only); and in *Lee v. Soames*, 35 W. R. 881; see above, p. 185, n. (*l*). Also in *Royon v. Paul*, 28 L. J. Ch. 555, the purchaser's right to rescind the contract for the vendor's want of title was clearly recognised, and such rescission was held to be a good defence to the vendor's action for specific performance; see *Laughton v. Port Erin Commrs.*, 1910, A. C. 565, 569. And in *Brewer v. Broadwood*, 22 Ch. D. 105, such rescission was considered to be a good defence to the vendor's action for damages for breach of the contract. The equitable right to take active proceedings to rescind a contract of sale for the other party's default is further illustrated where the defendant to an action for specific performance fails to comply with a judgment against him. In this case the plaintiff may, at his election, move in the action to have the contract rescinded and to obtain *restitutio in integrum*; *Foligno v. Martin*, 16 Beav. 586; *Clark v. Wallis*, 35 Beav. 460; *Henty v. Schröder*, 12 Ch. D. 666; *Hutchings v. Humphreys*, 54 L. J. Ch. 650, 652; *Ohle v. Ohle*, 1904, 1 Ch. 35; Fry, Sp. Perf. §§ 1171—1173, 3rd ed.; see below, § 3 of this chapter at end.

(*n*) Above, p. 1038.

o, *De Bernardy v. Harding*, 8 Ex. 822, 824.

p, *Weston v. Sarage*, 10 Ch. D. 736, 741; *Lee v. Soames*, 35 W. R. 881. At law, the deposit or any other sum of money paid on account of the purchase money could only be recovered without interest by a purchaser rescinding the contract in an action for money had and received, unless a written demand claiming payment of interest had been made

under stat. 3 & 4 Will. IV. c. 42, s. 28; *Walker v. Constable*, 1 Bos. & Pul. 306; *Flight v. Booth*, 1 Bing. N. C. 370; *Frühling v. Schroeder*, 2 Bing. N. C. 77, 80; 2 Dart. V. & P. 949, 5th ed. But in equity the purchaser rescinding the contract was entitled to have his deposit or any other sum paid on account of the purchase money returned to him with interest at four per cent.; see cases cited above, note (*m*). And under the present practice the purchaser

possession before completion and rescinds for the purchaser's failure to pay the price, may recover possession of the land sold. And it appears that either party lawfully rescinding the contract for the other's breach is entitled to recover his expenses incurred in discharge of any obligation imposed on him by the contract, as of the investigation of title (*q*), though it is questionable whether he is entitled to be recouped his expenses of entering into the agreement (*r*). The purchaser so rescinding the contract has an equitable lien on the land sold for any money paid to the vendor by way of deposit or otherwise on account of the purchase money, and interest thereon (*s*), and also, it seems, for his

Purchaser's
lien for the
deposit, &c.

rescinding the contract may recover interest according to the rule of equity without having made any demand or claim under the above-mentioned statute; see cases cited above, p. 1039, n. (*a*).

(*q*) *Lee v. Stames*, 36 W. R. 884, 885, 886, where the purchaser, suing to rescind, appears to have recovered his expenses of investigating title, erroneously described as damages; *Ketton v. Hewitt*, 1901, W. N. 21; 2 Dart, V. & P. 945, n. (*b*), 957, n. (*v*), 5th ed.; and consider *Campbell v. Gilbert*, 1 Esp. 221, 223; *De Bernardy v. Harding*, 8 Ex. 822, 824; and the facts that such expenses may be recovered by a party rescinding the contract for innocent misrepresentation and that at common law rescission for an innocent misrepresentation could only take place by way of rescission for breach of an essential stipulation forming part of the contract; above, pp. 807—811, 814, 834, 835; *Carlisle v. Salt*, 1906, 1 Ch. 335, 341, as to which case see above, pp. 765, n. (*o*), 768, 769, and n. (*f*). And in several cases where, on a vendor and purchaser summons, the contract has been rescinded at the purchaser's instance for the vendor's failure to show a good

title, the vendor has been ordered to pay the purchaser's costs of investigating the title; *Re Higgins and Hitchman's Contract*, 21 Ch. D. 95; *Re Veilding and Westhead*, 31 Ch. D. 344; *Re Haggewee and Thompson's Contract*, 32 Ch. D. 451; *Re Higgins and Percival*, 59 L. T. 213; *Re Ebsworth and Tidy's Contract*, 42 Ch. D. 23, 53; *Re Bryant and Birmingham's Contract*, 44 Ch. D. 218, 222; *Re Hare and O'More's Contract*, 1901, 1 Ch. 93; *Re Walker and Oakshott's Contract*, 1901, 2 Ch. 383, 337.

(*r*) See above, p. 835, and n. (*r*). It may be suggested, however, that the expenses of preparing, stamping and executing a memorandum of the contract, being those of putting the agreement into the form required by law to make it enforceable, are expenses properly incurred under the contract, which is not void when concluded by word of mouth only; see above, pp. 10, 864; below, p. 1069. Of course the expenses of any negotiation preliminary to the conclusion of the contract could not be recoverable; below, p. 1069.

(*s*) *Wyllies v. Lee*, 3 Drew. 396; *Rose v. Watson*, 10 H. L. C. 671; *Whitbread & Co. v. Watt*, 1902, 1 Ch. 835.

expenses incurred in pursuance of the contract (*t*). And this lien arises in every case of lawful rescission by the purchaser (*u*), including rescission under a power in that behalf expressly reserved to him by the contract (*x*). The purchaser's lien in these respects is a right exactly similar to and enforceable in the same manner as the vendor's lien for unpaid purchase money (*y*).

Party rescinding a part-performed contract liable to restore anything received thereunder.

Rescission must, as a rule, be accompanied by *restitution in integrum*.

Exception in the case of a deposit.

As any party rescinding the contract for the other's breach is entitled to be restored to his former position, so, it is conceived, he is in general bound to return to the other any property or profit which he has himself received under the partial execution of the agreement. It is thought that in every case in which a party to a contract lawfully rescinds it, whether for the other party's breach of some stipulation, which goes to the root of the whole consideration (*z*), for the other's renunciation of the contract (*a*), for non-fulfilment of some condition subsequent, under an express power to rescind (*b*), or for misrepresentation, duress, or undue influence (*c*), the rule is that he shall not enjoy the advantage of rescission without yielding up every benefit he has taken by the previous part-performance of the contract (*d*). But an exception to this rule occurs, with regard to a deposit paid on a sale of land to the vendor, or his agent, where the vendor lawfully rescinds the contract for the purchaser's breach or renunciation of it. In this case the vendor is generally entitled to retain the deposit, which was paid to him partly as a guarantee for the purchaser's due perform-

t, *Kitten v. Hewitt*, 1901, W. N. 21; *Re Furness and Aird's Contract*, 1906, W. N. 215; and cases decided on vendor and purchaser summons and cited above, p. 1053, n. (*q*).

u, Above, p. 834.

x, *Whitbread & Co. v. Watt*,

1902, 1 Ch. 835.

(*q*) Above, pp. 1026, 1032.

(*z*) Above, pp. 809, 1038.

a, Above, p. 1040.

b, Above, pp. 1015, 1016.

(*c*) Above, pp. 805 *sq.*

(*d*) Above, pp. 1016, 1017, and

n. *d*), p. 1051, and n. (*m*).

ance of the agreement, and was intended to be forfeited if the purchaser should break the contract; and the purchaser cannot recover it back from him (*e*). And it is submitted that the vendor is equally entitled to the deposit, on rescinding the contract for the purchaser's breach or renunciation of it, where the deposit has been paid to a stakeholder without special provision for its application. In this case also the parties' intention appears to be that the sum deposited shall be held by the stakeholder, not only to abide the event of completion of the contract, but also as a guarantee for the purchaser's due performance of the agreement, and to be forfeited to the vendor if the purchaser make default (*f*). But it appears that this exception applies

(*e*) *Dunn v. Fere*, 19 W. R. 151; *Expte. Borrell*, L. R. 10 Ch. 512; *Howe v. Smith*, 27 Ch. D. 89; Farwell, L. J., *Workman*, *Clark & Co., Ltd. v. Lloyd Brazilians*, 1908, 1 K. B. 988, 979; *Sprague v. Booth*, 1909, A. C. 576, 580; above, p. 26.

(*f*) It is thought that this conclusion follows from the decision and judgments given by the Court of Appeal in *Howe v. Smith*, 27 Ch. D. 89, in which case, it is important to note, the Court considered that the purchaser had committed such a breach or made such a renunciation of the contract as entitled the vendor to rescind, that the vendor *had elected to rescind*, and that he had resold, *not* under the power of resale in the contract, but *as owner*. In *Jackson v. De Kadich*, 1904, W. N. 168, however, Farwell, J., declined, on an application made *ex parte* by a vendor lawfully rescinding the contract for the purchaser's default, to make a declaration that he was entitled to a deposit placed as such, but without provision for its application, in a stakeholder's hands. He remarked that the vendor cannot have rescission, and, at the same time, damages for the breach of the contract; and that in *Howe v. Smith* there was no rescission. On the latter point, however, he was mistaken, as we have seen. As to his other reason, no doubt the rule is that a vendor cannot at once have rescission and damages for breach: but *Dunn v. Fere* and *Howe v. Smith*, *ubi sup.*, established that an exception may arise with regard to a deposit paid on a sale, and that, in the absence of stipulation to the contrary, the intention will be implied, from the very nature of a deposit, that it shall be a guarantee for the purchaser's due performance of the contract, and shall be forfeited on his default to the vendor. Can it reasonably be supposed that the parties intended the deposit to be returned to the purchaser in the event of the vendor electing to rescind the contract, when entitled to do so by reason of the purchaser's breach or renunciation of the contract? In *Howe v. Smith* the Court of Appeal thought not, where the deposit is paid to the vendor. It is thought that a deposit is placed in a stakeholder's hands for safe custody only pending the happening of some event, in which it is to be paid over to one of the parties; and that, otherwise, a deposit is paid to a stakeholder on the

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only to money paid as a deposit, that is, in earnest or as a guarantee for the payer's due performance of the contract, and does not extend to other sums of money paid on account of the purchase money (*g*). And the question, whether the deposit is to be forfeited on the purchaser's default, is one of the parties' intention to be gathered from the whole agreement; so if the contract contain any clause inconsistent with such an intention, it will be excluded (*h*). The principle governing the case of the forfeiture on the purchaser's default of a deposit paid by him on signing a contract for the sale of land has been applied where other property is transferred by a party to a contract as a guarantee for his due performance of his agreement. Thus where a builder had made default in performing a building agreement, containing a stipulation that all plant and materials brought by him on to the land to be built on should be considered the property of the landowner

same conditions exactly as it is paid to the vendor himself: *Collins v. Stimson*, 11 Q. B. D. 142, 143: see also *Espre. Barrell*, L. R. 10 Ch. 514; Farwell, J., *Hart v. Porthgair Harbour Co., Ltd.*, 1903, 1 Ch. 690, 696; Farwell, L. J., *Workman, Clark & Co., Ltd. v. Lloyd Brazillano*, 1908, 1 K. B. 968, 979; *Soragie v. Booth*, 1900, A. C. 576; *Shuttleworth v. Cloves*, 1910, 1 Ch. 176. It is true that in the case of *Macgregor v. Macfar*, 1 Cox, 259 (above, p. 1051, n. *m*), a vendor suing in equity for the rescission of the contract on account of the purchaser's default was decreed to return the deposit, notwithstanding that the contract contained an express provision for its forfeiture; but it does not appear that this point was argued or contested, and it is submitted that in this respect the decision must now be taken to have been overruled by *Hogg v. Smith*, *ubi sup.* And in *Degen v. Vere*, 19 W. R. 151, and *Olde v. Olde*, 1904, 1 Ch. 55. Farwell, J., a vendor, actively asserting his right to rescind the contract for the purchaser's default, was allowed to retain a deposit paid to him. Besides this, it is held at law that, although a contract of sale be rescinded by the exercise of an express power of resale contained therein, any deficiency in price on the resale may nevertheless be recovered from the purchaser under a special stipulation to that effect to be implied in the agreement; *Lamond v. Davall*, 9 Q. B. 1030, 1032; below, p. 1059.

g, *Palmer v. Temple*, 9 A. & E. 508, 520, 521; *Cornwall v. Henson*, 1900, 2 Ch. 298, 302, 305; above, p. 1017, n. (*d*).

h, *Palmer v. Temple*, 9 A. & E. 508, 520, where a stipulation,

that either party making default should pay 1,000*l.* as liquidated damages, was held to exclude any intention that the deposit should be forfeited; *Hogg v. Smith*, 27 Ch. D. 89, 93, 97.

until completion of the contract, it was held that he had no right to recover the property from the landowner (*i*). As we have seen (*h*), the vendor lawfully rescinding the contract for any cause is entitled to have the abstract returned to him, and the purchaser may not keep a copy of it. Return of abstract.

Where the purchaser has been let into possession or receipt of the rents and profits pending completion on the terms that he shall pay interest on the purchase money as from the date of his entry (*l*), or shall pay the purchase money by instalments, and he afterwards commits a breach of contract giving rise to the right to rescind, the vendor electing to rescind the contract is entitled in equity to be reinstated in possession of the land and to recover any rents or profits received by the purchaser (*m*), but not, it has been held (*n*), to charge him with an occupation rent for any part of the premises which he occupied himself. And it is thought that the vendor would be correspondingly bound to return any money actually paid to him under the agreement either for interest or principal (*o*). It is also conceived that a purchaser, who had been so let into possession and elected to rescind for the vendor's breach of contract, would in equity be similarly liable to deliver up possession of the land and to account for the rents and profits received by him and entitled to recover any sums paid on account of the purchase money (*p*). In these cases the purchaser would not be liable *at law* for the use and occupation of the premises prior to rescission Rescission where the purchaser has been in possession.

i) *Hart v. Portuguese Harbour Co., Ltd.*, 1903, 1 Ch. 699. Cf. *Re Ken.*, 1902, 1 K. B. 555.

h) Above, p. 1017, n. (*f*).

l) Above, pp. 524, 525.

m) *Clark v. Wells*, 35 Beav. 460; above, p. 1051, and n. (*n*).

n) *Entick v. Hamphrys*, 54 L. J. Ch. 650, 652; cf. above, pp. 834, 835, and n. (*q*).

o) Above, pp. 1051, and n. (*u*), 1054, 1055.

p) See the last two notes.

of the contract (*q*). But if he held over after the rescission, he would be so liable (*r*).

Where an order is made authorising entry into possession to satisfy the vendor's lien, after conveyance, that is not rescission of the contract.

Here it may be noted that, where conveyance has been made without payment of the price, and the vendor afterwards brings an action to enforce his lien, and, the land proving unsaleable, obtains an order authorising him to enter into and hold possession (*s*), it appears that the order is really made by way of giving him specific enjoyment of the thing pledged to satisfy his lien and in the nature of foreclosure, and not by way of rescission of the contract involving *restitutio in integrum*; and it does not appear that the purchaser could be required to account for any rents or profits received by him (*t*).

Rights of vendor electing to rescind.

Where the vendor lawfully rescinds the contract for the purchaser's breach, he is remitted to his former position as full owner of the land, which was the subject of the contract, and thenceforth may well exercise all rights incident to such ownership, including the power of disposition. He may therefore lawfully resell the land (*u*). But a resale under the liberty of

Resale after an election to rescind.

(*q*) *Winterbottom v. Ingham*, 7 Q. B. 611, 619; Sug. V. & P. 179; *Markey v. Cooté*, 10 I. R. C. L. 149.

(*r*) *Howard v. Shaw*, 8 M. & W. 118; *Markey v. Cooté*, *ubi sup.*

(*s*) Above, p. 1032.

(*t*) Consider *Altyod v. Merryland, &c. Ry. Co.*, 33 Ch. D. 571. It is respectfully submitted that, though the decision in this case was correct, the learned judge was wrong in suggesting that in an ordinary case of vendor's lien (that is, where a conveyance has been executed) the vendor would be entitled to rescind the contract for the purchaser's failure to pay the price. It is submitted that

in this respect the law is the same for a sale of land as of goods, and that, subject only to the vendor's equitable lien and the remedies for enforcing it, the contract cannot be rescinded *after conveyance* for the purchaser's failure to pay the price; see above, p. 1032, and n. (*u*).

(*u*) *Howe v. Smith*, 27 Ch. D. 89, in which case it was considered that the reservation in the contract of an express power of resale on the purchaser's default did not prevent the vendor from rescinding the contract in that event and thereafter selling *as owner*; above, p. 1055, n. (*f*).

resale arising from the ownership restored to the vendor by his *rescission* of the contract is entirely different both from a resale under a power of resale expressly reserved to the vendor in case of the purchaser's default, and from a resale by a vendor who has *not* rescinded the contract, but resells in order to realise his lien for the price under a power in that behalf alleged to be implied in the contract (*x*). If the vendor resell after he has elected to rescind the contract, he resells in his capacity of *owner* of the land and for his own benefit and at his own risk exclusively. If the land realise a higher price than at the sale rescinded, he is entitled to keep the surplus (*y*); and if the price were lower, he has no right of action against the former purchaser for the difference; for, having once elected to rescind the contract, he can no longer claim to treat it as subsisting and recover damages for its breach (*z*). On the other hand, where the land is resold under an express power of resale on the purchaser's default, the contract is indeed rescinded (*a*) and the vendor at liberty to retain any surplus over the original price (*b*): but if the resale were at a lower price the vendor is entitled to recover the difference from the purchaser, *not* as general damages for breach of the contract, but under a special stipulation to that effect expressed (*c*) or to be implied in the agreement (*d*). Where these stipulations are

Resale under
an express
power of
resale.

x See above, pp. 51—54, 1032, where it is maintained that the better opinion is that, in the absence of express stipulation, the vendor has no power of resale to realise his lien for the price.

(*y*) *Expte. Hunter*, 6 Ves. 94, 97; *Sug. V. P.* 39; dealing with the case of a resale under an express power, which rescinds the contract; above, p. 54, and n. (*f*). The same law applies, *à fortiori*, in the case of a resale

as owner after an election to rescind.

z, Above, p. 1042; *Henry v. Schroeder*, 12 Ch. D. 666; and consider *Harding v. Harding*, 4 My. & Cr. 514, 520; *Lamond v. Davall*, 9 Q. B. 1030; *Sug. V. & P.* 39—41; Benjamin on Sale, 648, 2nd ed.

(*a*) Above, pp. 54, n. (*f*), 1016.

(*b*) Above, n. (*y*).

(*c*) Above, pp. 68, 69, 74.

(*d*) *Lamond v. Davall*, 9 Q. B. 1030, 1032; Benjamin on Sale, 648, 2nd ed.

Resale to
enforce the
vendor's lien.

incorporated in the contract, the deposit, if any, must be applied as far as it will go in satisfaction of the difference in price on the resale, notwithstanding that the contract expressly provide that the deposit shall be forfeited on the purchaser's default (*e*). A resale made to enforce the vendor's lien, either by the vendor himself affirming the contract and claiming an implied power to resell for the purpose (*f*), or under an order of the Court obtained at the vendor's instance (*g*), is like a sale made by a pledgee of goods to recoup himself (*h*). The contract is not thereby rescinded (*i*); any surplus in price obtained on the resale belongs to the purchaser (*k*); and if the land be resold at a lower price, the vendor may recover the difference in an action on the contract claiming general damages for the purchaser's breach (*l*).

Title under
a sale by a
vendor
reselling.

If, on a sale of land, the purchaser have notice that the vendor has entered into a prior contract for sale thereof, which has not been carried out, and the vendor claim to have lawfully rescinded that contract for the default of the other party thereto, the purchaser must, of course, require very clear evidence that the prior purchaser has committed such a breach of the contract as justified the vendor in rescinding it (*m*). If the fact be at all doubtful he should refuse to accept the title, for, having notice of the prior contract, he will be bound thereby, in case it be still subsisting and enforceable (*n*). And unless the vendor can prove the fact to be reasonably certain, he cannot oblige the purchaser to accept

See *Ockenden v. Healy*, E. B. & E. 485; *Shuttleworth v. Clews*, 1910, 1 Ch. 176, pointing out that the order in *Griffiths v. Fyfe*, 1906, 1 Ch. 796, was in this respect wrongly drawn up.

f See above, pp. 51-54, 1059, and n. *l*.

g Above, pp. 53, 1032.

h Above, p. 53.

i *Harding v. Harding*, 4 My. & Cr. 511; above, p. 53.

k Above, p. 53.

l See above, p. 53, n. (*d*); below, p. 1063.

m Above, pp. 1037-1039, 1050, 1051.

n Above, p. 565.

the title, even at law; still less can he enforce the second contract specifically (*o*). The same principles apply where the vendor claims that the prior contract was lawfully rescinded by him under an express power of rescission, or was otherwise discharged (*p*); in each case strict proof must be required of the facts alleged to have extinguished the obligation of the prior contract. If the vendor claim to be reselling under a power of resale expressly reserved to him by the prior contract (*q*), the purchaser must require equally clear evidence that the event has occurred in which the power of resale was to become exercisable (*r*), and should observe equal caution in accepting the title. The case is similar to that of a mortgagee selling under his power of sale, but there are not usually any special stipulations to protect the purchaser in the event of an improper exercise of the power (*s*). If the vendor claim to be reselling under a power of resale alleged to be impliedly reserved to him by the prior contract, and that contract contain no special stipulations from which such a power might reasonably be implied, the purchaser is advised not to accept the title (*t*).

§ 2.—*Of claiming Damages under the Contract.*

We have seen that every breach of a contract to sell land results in a right of action at law to recover damages for the breach (*u*); and that, where the breach is of an essential stipulation, the injured party, if he do not choose to rescind the contract, may affirm it and sue for damages for the breach or else for the specific performance of the contract (*x*). We will now consider

Remedy by
action for
damages at
law.

(*o*) Above, p. 134.

(*p*) Above, pp. 1008 *sq.*

(*q*) Above, pp. 68, 69, 74, 1059.

(*r*) Above, pp. 293 *sq.*

(*s*) Above, pp. 335 *sq.*

(*t*) See above, pp. 51—54, 1059, and n. (*x*).

(*u*) Above, p. 1036.

(*x*) Above, pp. 1038, 1048, 1050.

What damages are recoverable.

The general rule as to damages.

what damages are recoverable by either party in case of his election, on the other's breach of contract, to affirm the agreement and to pursue his remedy for damages at law. It appears that this is to be determined by the general rule of the common law with respect to the damages recoverable for breach of contract, as qualified by the decision in *Flureau v. Thornhill* (y) and *Bain v. Fothergill* (z), that where the breach complained of arises from the vendor's inability (without his own fault) to show a good title, the purchaser is not entitled to any damages for the loss of his bargain (a). The general rule of the common law is that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position, with respect to damages, as if the contract had been performed (b). But this rule must be read in connection with the principle that the damages recoverable for breach of contract "should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it" (c).

Damages recoverable by the vendor.

The vendor's right to damages is governed by the general rule; he is entitled to substantial compensation for the purchaser's failure to fulfil the bargain, as in the case of a sale of goods (d). But if the purchaser

(y) 2 W. Black. 1078.

(z) L. R. 7 H. L. 158; above, 14p. 36, 37.

(a) Parke, B., *Robinson v. Harman*, 1 Ex. 850, 855.

(b) Ibid.; *Wall v. City of London Real Property Co.*, L. R. 9 Q. B. 249, 253. These dicta in *Robinson v. Harman* appear to be good law (see *Wigzell v. School for Indigent Blind*, 8 Q. B. D. 357,

364; *Atkinson, L. A., Addis v. Gramophone Co., Ltd.*, 1909, A. C. 488, 494, 495); but the decision in that case was overruled by *Bain v. Fothergill*.

(c) *Hudley v. Barendale*, 9 Ex. 341, 351.

(d) *Laird v. Tim*, 7 M. & W. 474, 478; *Noble v. Edwards*, 5 Ch. D. 378.

break the contract, as by refusal to accept a good title, duly proved (*e*), or by failure to pay the price before the vendor has parted with his estate in the land, the vendor cannot recover the whole price as damages, but is limited to the loss which he has actually sustained (*d*), that is to say, the difference, if any, between the value of the land as remaining on his hands at the date of the breach and the price agreed to be paid (*f*). And this is equally the case where the purchaser has been put into possession without any conveyance being executed, for the vendor then retains his legal estate in the land, and is, consequently, entitled to resume possession on the purchaser's breach of contract (*g*). Where the purchaser has been let into possession before completion on the terms that he shall pay interest on the purchase money from the time of his taking possession (*h*), and he afterwards commits a breach of the contract, the vendor affirming the agreement will be entitled to recover the interest as damages, and the purchaser to keep any ordinary casual profits received by him during his possession: but where the purchaser has obtained profits by any act of waste, though committed in accordance with the agreement, the vendor may recover damages for the consequent deterioration in value of the inheritance remaining on his hands (*i*). If a deposit were paid, and the purchaser commit a breach of contract, the vendor affirming the contract, of course, cannot claim to retain the deposit as *forfeited*, and to be paid, *in addition*, his full measure of damages for the breach: but he is entitled to keep the deposit or recover it from

Where the purchaser has been in possession.

Where a deposit has been paid.

(*e*) See *Lethbridge v. Kirkman*, 25 L. J. Q. B. 89.

(*f*) *Barrow v. Arnaud*, 8 Q. B. 604, 609, 610; Benjamin on Sale, 617, 618, 2nd ed.; and consider *Noble v. Edwards*, 5 Ch. D. 378.

(*g*) *Laird v. Pim*, 7 M. & W. 474, 478; *Moor v. Roberts*, 3 C. B.

N. S. 830, 841. See above, pp. 506, 516, 524—527, 1057, 1058, and n. (*r*).

(*h*) Above, pp. 524, 525.

(*i*) *Laird v. Pim*, 7 M. & W. 474; see above, pp. 517, 524; and cf. above, p. 1057.

a stakeholder (*h*) in part payment of the price, and to recover the damages, if any, which he has sustained by the breach, after taking into account, to the purchaser's credit, the payment of the deposit. And this is the case, although the contract expressly provide that, on the purchaser's failure to comply with the conditions thereof, the deposit shall be forfeited (*l*); for any such stipulation would be construed as conferring only the right to treat the deposit as forfeited on *rescission* of the contract (*m*). A similar stipulation for forfeiture of the deposit as *liquidated damages* does not preclude the vendor from suing for damages for any loss sustained by him after giving credit for the amount of the deposit (*n*). Where the vendor has executed a conveyance without receiving payment of the entire purchase money (*o*), he can sue for the whole amount remaining unpaid in the event of the purchaser's omission to pay it as agreed. In that event the amount due becomes a debt, and is recoverable accordingly (*p*).

Where a conveyance has been executed.

As to the vendor's expenses of the sale.

If, on the purchaser's breach of contract, the vendor affirm the agreement and sue for damages thereunder, it does not appear that he can recover his expenses of entering into the agreement or proving title (*q*), for, as we have seen (*r*), he is entitled to substantial damages for loss of his bargain on the footing of being placed, as far as money can do it, in as good a position as if the contract had been carried out. But if the contract had been completed, he would have had to bear his own

(*h*) Above, pp. 27, 1055, and n. (*f*).

(*l*) Above, p. 74.

(*m*) Consider *Ockenden v. Henly*, E. B. & E. 485; *Shuttleworth v. Chies*, 1910, 1 Ch. 176; above, pp. 1056, 1060.

(*n*) *Ively v. Grew*, 6 N. & M. 467.

(*o*) Above, p. 1026.

(*p*) Above, pp. 1026, 1037; Benjamin on Sale, 622, 2nd ed.

(*q*) Observe the items of the damages recovered in *Laird v. Fim*, 7 M. & W. 474; cf. above, pp. 1052—1054.

(*r*) Above, p. 1062.

expenses; and to allow him to recover his expenses, *in addition* to compensation for his loss, would be to place him in a *better* position by reason of the breach of contract than he would have occupied if the agreement had been carried out (s).

The purchaser's right to damages for breach of the contract is governed by the special rule that, where the breach of the contract is occasioned by the vendor's inability, without his own fault, to show a good title, he shall be entitled to recover, as damages, his deposit, if any, with interest, and his expenses incurred in connection with the agreement, but not more than nominal damages for loss of his bargain (t). Subject to this special rule, however, the purchaser's right appears to be regulated by the general law (u). The reason given for the rule in *Flureau v. Thornhill* (x) is that, owing to the difficulties and uncertainty of the English law of real property, the parties to a sale of land must be taken to have contracted on the understanding that, if the purchase goes off because of the vendor's inability to make a good title, the purchaser shall only be recouped the expenses he has incurred, and shall not recover any other damages (y). This rule applies in every case where the vendor's breach of the contract is

What damages are recoverable by the purchaser.

(s) It is clear that, if the vendor execute a conveyance without payment, his lien extends only to the price and interest thereon, and he has no claim to be recouped his expenses. Consider cases cited above, p. 1026. And it is thought that the same principle is applicable where the vendor is not entitled to recover the whole price as damages. See below, pp. 1071, 1072.

(t) *Flureau v. Thornhill*, 2 W. Black. 1078; *Sikes v. Wild*, 1 B. & S. 587, 4 B. & S. 421; *Bain v. Fothergill*, L. R. 7 H. L. 158.

This rule also applies to contracts to grant a lease of land in which the lessor undertakes to show a good title; *Robinson v. Harman*, 1 Ex. 850; *Hanslip v. Padwick*, 5 Ex. 615; *Gas Light and Coke Co. v. Towse*, 35 Ch. D. 519, 543; *Pease v. Courtney*, 1904, 2 Ch. 503, 511, 512; see above, p. 97, n. (m).

(u) *Engel v. Fitch*, L. R. 4 Q. B. 659; *Day v. Singleton*, 1899, 2 Ch. 320.

(x) 2 W. Black. 1078.

(y) *Bain v. Fothergill*, L. R. 7 H. L. 158, 207, 210.

*Bain v.
Fothergill.*

*Day v.
Singleton.*

owing to his inability, without his own fault, to make a good title, even though he had expressly or impliedly (z) represented, contrary to the fact but without fraud, that he *had* a good title (a). Thus, where the owner of leaseholds not assignable without the lessor's licence has sold them without mentioning this restriction (b), and the lessor has refused to give his consent to the sale, the purchaser can recover no damages beyond his expenses (c). But the rule in question is only applicable where the vendor's breach of contract arises from his inability to make a good title after he has made an honest effort to discharge his obligation in this respect, and has done all that lies within his own power to carry out the agreement (d). For example, where an owner of leaseholds not assignable without the lessor's licence had sold them subject to his consent to the assignment being obtained (e), and, instead of endeavouring to procure the lessor's licence, actually induced him to refuse it, it was held that the purchaser was entitled to recover substantial damages for the vendor's breach of duty (f). And it appears that, where the vendor's breach of contract consists in his wilful refusal or neglect to take the steps proper to prove his title, as to deliver an abstract, he would be liable to pay substantial damages (g). So if the vendor commit a breach of his duty to convey the land sold or to put the purchaser in possession (h), and the breach

(z) Above, pp. 653, 654, 827.

(a) *S. C.*, overruling *Hopkins v. Grzechbrook*, 6 B. & C. 31, and *Robinson v. Harman*, 1 Ex. 855, which decided the contrary. The innocent misrepresentation is not a cause of action for damages; above, p. 822.

(b) Above, pp. 358—361.

(c) *Bain v. Fothergill*, *ubi sup.*; see also *Pease v. Courtney*, 1904, 2 Ch. 603.

(d) See *Turner, L. J., Williams v. Ginton*, L. R. 1 Ch. 200, 209.

(e) Above, pp. 359, and n. (k), 360, 1015.

(f) *Day v. Singleton*, 1899, 2 Ch. 320.

(g) Consider *Jones v. Gardiner*, 1902, 1 Ch. 191. *Quere*, whether this principle should not have been applied in *Compton v. Bagley*, 1892, 1 Ch. 313.

(h) Above, pp. 578, 610, n. (c).

be caused, not by his inability to make a good title, but by his wilful refusal or neglect to do some act, which lies entirely within his own power and is necessary to discharge his obligation in these respects, the purchaser is entitled to recover damages for loss of his bargain to be calculated according to the general principle of the law (*i*). Thus where mortgagees sold the mortgaged land, with vacant possession, under their power of sale, and the mortgagor was in possession and they deliberately omitted to eject him, and were therefore unable to hand over possession at the time for completion, it was held that the purchaser was entitled to recover substantial damages for his loss, and that the measure of damages was the difference between the contract price and the value of the land at the time of the breach of contract; and the purchaser having resold the land at an advanced price, it was considered that, in the absence of any other evidence, the price at which the purchaser resold might be taken to be the value of the land; and the purchaser recovered accordingly the amount of the profit on the resale (*k*). It should be noted however that, although a vendor, who has contracted to give vacant possession, is bound at his peril to eject a tenant by sufferance (*l*), a tenant at will or a trespasser (*m*), who refuses to give up possession, he is not obliged to engage in litigation with persons asserting in good faith and with apparent or reasonably possible right claims adverse to his title (*n*). And it is thought that, if he preferred to renounce the contract rather than engage in such litigation, he could not be cast in

Engel v.
Fitch.

(*i*) *Engel v. Fitch*, L. R. 4 Q. B. 659; *Gulwin v. Francis*, L. R. 5 C. P. 295, 306, 308; *Day v. Singleton*, 1899, 2 Ch. 320, 329, 332—334; and consider *Cornwall v. Henson*, 1900, 2 Ch. 298; *Jones v. Gardiner*, 1902, 1 Ch. 191.

(*k*) See previous note.

(*l*) A mortgagor in possession

is in the position of a tenant by sufferance at law; notes to *Keech v. Hall*, 1 Smith, L. C.: Wms. Real Prop. 551, and n. (*a*), 21st ed.

(*m*) Above, pp. 512, 516.

(*n*) *Turner, L. J., Williams v. Glyn-ton*, L. R. 1 Ch. 200, 208.

substantial damages. And where his title is imperfect, he is of course not liable to pay substantial damages if he decline to buy in any outstanding estate or incumbrance. Such an act as this would depend on others' consent, and does not lie entirely within his own power (*o*).

As to the deposit and other purchase money paid.

A purchaser affirming the contract for sale and claiming damages for the vendor's breach of the agreement is entitled, as we have seen (*p*), to recover his deposit, with interest. And if the deposit were paid to an auctioneer or other stakeholder, he can recover interest thereon, as damages, from the vendor (*q*). The purchaser may also claim, as damages, to be recouped, with interest, any other sums he may have paid on account of the purchase money, beyond the deposit (*r*), or to be compensated for any other property, which he may have parted with, or for any act done to his detriment as part of the consideration for the sale. For where land is agreed to be conveyed for any consideration immediately executed in favour of the person promising to convey, it is impossible to suppose that the parties contracted on the understanding implied in cases like *Flureau v. Thornhill* (*s*), where the contract is executory on both sides; and the other party is entitled, as regards the executed consideration, to be placed, as far as damages can do it, in as good a position as if the contract had been carried out (*t*). It appears, however, that if in such a case the purchaser

o. See above, pp. 164—168.

(*p*) Above, p. 1065; *Compton v. Bagley*, 1892, 1 Ch. 313, 321; *Day v. Singleton*, 1899, 2 Ch. 320; Sug. V. & P. 562, 639.

q. *Farquhar v. Farley*, 7 Taunt. 592. As we have seen, the stakeholder himself is not liable to pay interest on the deposit, though he is bound to return the sum deposited to the purchaser on the

vendor's breach of the contract; above, p. 27.

(*r*) Consider *Sherry v. Oke*, 3 Dow. P. C. 349, 361; *Cornwall v. Henson*, 1900, 2 Ch. 298.

(*s*) Above, p. 1065.

(*t*) *Strutt v. Farlar*, 16 M. & W. 249; *Wall v. City of London Real Property Co.*, L. R. 9 Q. B. 249; above, p. 1062.

bought with full notice of the state of the vendor's title (*u*), and the vendor were prevented from carrying out the contract by a defect in the title and not by his own fault, the purchaser affirming the contract would not be entitled to more than nominal damages for loss of his bargain (*x*). Where the purchaser affirming the contract has the right to recover his expenses as damages, he is entitled to be recouped his expenses of preparing, stamping and executing the written memorandum of the contract (*y*), as well as those properly incurred in carrying out the agreement for sale. And under the latter head he may recover his costs of investigating the title (*z*) and searching for incumbrances (*a*), or, if the vendor's breach did not occur until after the acceptance of the title (*b*), the costs of preparing the conveyance (*c*). And the purchaser may recover the costs due from himself to his solicitor in respect of these items, although the solicitor's bill have not been paid (*d*). But the purchaser cannot recover any expenses which were purely preliminary to entering into the agreement for sale; as of any negotiations leading up to the sale, or of a survey or a valuation made before the sale for his own information (*e*). Nor can he get back any expenses of carrying out the agreement, which have been prematurely incurred. Thus, the purchaser is not justified in

Expenses recoverable by the purchaser as damages.

(*u*) Above, p. 203.

(*x*) Consider *Gas Light and Coke Co. v. Toose*, 35 Ch. D. 519, 543.

(*y*) *Hanslip v. Padwick*, 5 Ex. 615.

(*z*) Above, p. 1063, n. (*t*); *Richards v. Barton*, 1 Esp. 268; *Hanslip v. Padwick*, *Compton v. Bagley*, *ubi sup.*

(*a*) *Hodges v. Litchfield*, 1 Bing. N. C. 492, 499; Sug. V. & P. 362.

(*b*) Above, p. 579.

(*c*) Sug. V. & P. 362; 2 Dart, V. & P. 949, 5th ed.; 1076, 6th ed.; 990, 7th ed.

(*d*) *Richardson v. Chasen*, 10 Q. B. 756.

(*e*) *Hodges v. Litchfield*, 1 Bing. N. C. 492, 498; Sug. V. & P. 362. But on sales under the direction of the Court, the purchaser is entitled to be restored entirely to his former position as regards any expenses incurred by him, and may therefore recover, as damages, all costs occasioned by his having bid for and become the purchaser of the property so sold; *Holliwell v. Seacombe*, 1906, 1 Ch. 426.

preparing a conveyance until the vendor has shown such a title as he is bound to accept; and if he do so before that time, he cannot recover the expense of it in case the vendor fail to show such a title and so break the contract (*f*). So also he should not get the land surveyed until a good title has been shown, and cannot charge against the vendor the expenses of a survey prematurely made (*g*). But if the land were surveyed after a good title had been shown on the abstract, it is thought that the expense of the survey would be properly incurred (*h*), and would therefore be recoverable in case of a *subsequent* breach of the contract. The purchaser cannot recover, as expenses, any loss or outlay incurred in raising the purchase money; as a loss by selling any stock, shares or securities to provide the money (*i*), or the costs or charges of borrowing the money (*k*): but if before the breach the contract had proceeded to such a point that it was reasonable for the purchaser to have the money ready to complete the purchase, he may recover, as damages, interest on any money so lying idle, whether it were actually raised or were only held ready by a third party to be applied to the purchaser's use at call (*l*). The purchaser cannot recover the extra costs as between solicitor and client of an action for specific performance of the contract brought against him by the vendor and dismissed with costs as between party and party (*m*), or his own costs of an action for specific performance brought by himself and dismissed without costs on the vendor's failure to prove a good title (*n*). Where the purchaser has been

(*f*) *Jermain v. Egelstone*, 5 Car. & P. 172; *Hodges v. Litchfield*, 1 Bing. N. C. 492, 499; Sug. V. & P. 362.

(*g*) Sug. V. & P. 362.

(*h*) Above, p. 610; Sug. V. & P. 362.

(*i*) *Flureau v. Thornhill*, 2 W. Black. 1078.

(*k*) *Hanslip v. Padwick*, 5 Ex. 615.

(*l*) *Sherry v. Oker*, 3 Dow. P. C. 349, 361; Sug. V. & P. 237, 362, 640.

(*m*) *Hodges v. Litchfield*, 1 Bing. N. C. 492.

(*n*) *Malden v. Fyson*, 11 Q. B. 292; see above, p. 88, and n. (*x*).

let into possession pending completion, with liberty to do repairs or make alterations or improvements at his own expense, he cannot recover any money so spent among his expenses of carrying out the agreement (*o*). *A fortiori*, he cannot recover any money so spent, where he did the repairs or made the improvements without any express agreement with the vendor authorizing him to do so (*p*). If the purchaser choose to incur any expenses in assumed furtherance of the agreement after he has been made aware of a definite breach of contract on the vendor's part, he must pay them out of his own pocket and cannot charge the vendor therewith, as damages (*q*).

A question arises, whether the purchaser is entitled to get back his expenses in connection with the agreement in a case where he is allowed to recover substantial damages for the vendor's breach of contract. It is submitted that he is not. It is true that in the case of *Engel v. Fitch* (*r*), above stated, the purchaser was actually allowed to recover damages for loss of his bargain in addition to his expenses of investigating title, &c.: but this appears to have been owing to the form in which the question was presented to the Court. The vendor had paid into Court enough to satisfy the purchaser's expenses; and at the trial a verdict was taken *by consent* for the plaintiff, who was the purchaser, for the amount of the profit on his resale *beyond* the money paid into Court, with leave to move to enter the

Whether the purchaser can recover his expenses where he is allowed substantial damages for loss of his bargain.

(*o*) *Bratt v. Ellis*, Sug. V. & P. 812; *Worthington v. Worthington*, 8 C. B. 134.

(*p*) See above, pp. 524, 525.

(*q*) *Ponsett v. Fuller*, 17 C. B. 660; *Sikes v. Wild*, 1 B. & S. 587, 590, 4 B. & S. 421, 424.

(*r*) L. R. 4 Q. B. 659; above, p. 1067. And in *Godwin v. Francis*, L. R. 5 C. P. 295, it

was admitted, apparently on the authority of *Engel v. Fitch*, that a purchaser entitled to damages for loss of his bargain should recover his expenses of investigating title as well. But it appears to have been overlooked that this would place him in a better position than if the contract had been carried out.

verdict for the defendant. A rule *nisi* was accordingly obtained and was discharged by the Court of Queen's Bench, whose decision was affirmed in the Exchequer Chamber. The result of this was that the purchaser obtained as damages not only the whole amount of the profit on the resale, but his expenses of the original sale as well. These he would have had to pay out of his own pocket if the original sale had been duly completed. The result of the verdict, therefore, was to place him in a better position by reason of the breach of contract than he would have occupied if there had been no breach. Such a result, it is submitted, cannot possibly be supported. The true principle appears to have been applied in the case of *Day v. Singleton* (s). In that case the purchaser claiming damages as plaintiff was allowed by Romer, J., to recover his deposit, with interest, and his costs of investigating the title. On appeal this judgment was reversed, except as regards *the deposit*; it was declared that the plaintiff was entitled to substantial damages for the vendor's breach of duty, and an inquiry was ordered to ascertain the amount of such damages according to the general principle of the Common Law. It seems, therefore, to have been recognised that, as the purchaser was to have substantial compensation for the loss of his bargain, he was not entitled, in addition, to recover expenses, which he would have had to bear himself if the contract had been completed (t). Where land has been sold for a particular purpose, as for carrying on a trade

Damages for loss of profit, where land sold for a particular purpose.

(s) 1899, 2 Ch. 320; stated above, p. 1666. The head-note states that the purchaser was held to be entitled to recover damages for loss of his bargain, *besides* his expenses; but it does not correctly represent the effect of the judgment.

(t) The right principle as to the damages recoverable appears

to have been applied in *Hopkins v. Grzechbrock*, 6 B. & C. 31, and *Robinson v. Harman*, 1 Ex. 850; though the decision in each of those cases, that substantial damages were in the circumstances recoverable at all, has been overruled; above, p. 1666, n. (u).

or business there (*u*), and the vendor commits such a breach of contract as entitles the purchaser to damages for loss of his bargain, the purchaser's loss of profit from his inability to use the premises in the manner contemplated by the contract may be taken into consideration in assessing the damages recoverable from the vendor (*x*).

If the purchaser affirm the contract and claim damages for the vendor's breach, he has no lien on the land sold for the amount of damages recoverable, notwithstanding that this includes compensation for instalments of the purchase money actually paid (*y*).

Purchaser has no lien for damages.

It has been mentioned (*z*) that, on breach of an essential stipulation in the contract, the injured party electing to affirm the agreement has the alternative of suing at law for damages for the breach, or suing in equity for specific performance of the contract. Under the present practice, he can pursue these remedies in one action claiming alternative relief (*a*): but his recovery of judgment for damages will bar his right to enforce the contract specifically, as that is a conclusive

A party may sue for specific performance or damages in the alternative.

Judgment for either remedy bars the other.

(*u*) Above, pp. 576, 577.

(*x*) *Jaques v. Millar*, 6 Ch. D. 153; *Jones v. Gardner*, 1902, 1 Ch. 191.

(*y*) *Cornwall v. Henson*, 1900, 2 Ch. 298, 305; above, p. 1068. Cf. above, p. 1053.

(*z*) Above, p. 1050.

(*a*) *Cornwall v. Henson*, 1900, 2 Ch. 298. Under the old Chancery practice such alternative relief could not have been obtained in equity; *Sainsbury v. Jones*, 5 My. & Cr. 1; and, of course, not at law. After Lord Cairns' Act, stat. 21 & 22 Vict. c. 27, it was possible to claim damages in equity as an addition

to or in substitution for specific performance. Under the present practice a party suing in the alternative for specific performance or damages must take care to claim particularly such damages as he is entitled to recover at law for breach of the contract; otherwise his claim for damages may be treated as if it were merely made in substitution for the equitable remedy of specific performance, and may be defeated by anything which would bar his right to specific performance: see *Hipgrave v. Case*, 28 Ch. D. 356; *Nicholson v. Brown*, 1897, W. N. 52.

election to adopt the legal remedy (*b*), and the other party's obligation under the contract is then merged in the judgment (*c*). And if he obtain an order for specific performance of the contract, that will be a bar to his recovering damages for the breach (*d*); for in equity the plaintiff suing on a breach of contract was required, as a rule, to elect which remedy he would pursue (*e*); and a man entitled to alternative remedies is barred, after judgment on the one, from asserting the other (*f*). If an action claiming damages for a breach of the contract be brought against a party thereto, he may counterclaim for specific performance; when, if the counterclaim be successful, the action will fail (*g*), and *vice versa* (*h*), and the unsuccessful party will be estopped from again asserting a right to enforce the contract (*i*). And if such a counterclaim were not made, and judgment for damages were recovered, the defendant would equally lose all right to enforce the contract specifically; for the judgment would be conclusive against him that he had committed a breach of contract, so that he could then no longer maintain that he had always been ready and willing to carry out his

(*b*) *Orme v. Broughton*, 10 Bing. 533, 538; *Sainter v. Ferguson*, 1 Mac. & G. 286, 290.

(*c*) Above, p. 1045.

(*d*) *Dominion Coal Co., Ltd. v. Dominion Iron, &c. Co., Ltd.*, 1909, A. C. 293, 310, 311. In default of the defendant's compliance with the order, the plaintiff may rescind the contract, but cannot claim damages thereunder; *Henty v. Schröder*, 12 Ch. D. 666; above, p. 1051, n. (*m*). The passage in the text relates to common law damages, and not to those, which may in equity be given in addition to specific performance; see above, p. 1073, n. (*a*), and cases cited in n. (*x*); *Cooper v. Morgan*, 1909, 1 Ch. 261, where an order was made at a vendor's suit for specific

performance and payment of the purchase money with interest and such damages (if any) as he had sustained by reason of the contract not having been specifically performed.

(*e*) *Carriek v. Young*, 4 Madd. 437; *Phelps v. Frothero*, 7 De G. M. & G. 722, 733, 734; *Gedye v. Montrose*, 26 Beav. 45, 47; Dan. Ch. Pr. 757, 4th ed.; 2 Dart, V. & P. 993, 5th ed.

(*f*) *Scarf v. Jardine*, 7 App. Cas. 345; *Morel v. Westmorland*, 1904, A. C. 11; and note (*b*), above.

(*g*) *Green v. Sevin*, 13 Ch. D. 589.

(*h*) *Compton v. Bagley*, 1892, 1 Ch. 313.

(*i*) Above, p. 1045.

part of the contract (*k*). This doctrine, however, applies only in the case of breach of an essential stipulation contained in the contract. If the stipulation broken were not essential, judgment for damages for a breach thereof would not preclude either party from asserting afterwards the right to enforce the main duty of the contract either at law or in equity (*l*).

If either party to the contract bring an action for its specific performance, and the action be dismissed upon any ground which furnishes a good defence to an action at law for breach of the contract, the unsuccessful plaintiff is estopped by the judgment from proceeding to recover damages for the breach (*m*), unless the judgment were expressly declared to be without prejudice to the plaintiff's remedy at law (*n*). If, however, the action for specific performance were dismissed upon any ground (such as hardship or unfair dealing (*o*)) which affords no defence to an action at law for breach of the contract, the unsuccessful party would not be precluded from afterwards pursuing his legal remedy, notwithstanding that his right to sue at law were not expressly reserved (*p*). In either case the *defendant*

Effect of the dismissal of an action for specific performance.

(*k*) See *Walker v. Jeffreys*, 1 Hare, 341, 352; Fry, Sp. Perf. § 922, 3rd ed.; above, p. 1038. It appears that, under the old practice in equity, a judgment for damages at law for breach of a contract was in general a good plea in bar of a suit for specific performance of the contract; Mitford on Pleading, 253 (296, 5th ed.); Dan. Ch. Pr. 611—614, 4th ed.

(*l*) Above, pp. 1037, 1042, 1050.

(*m*) *Tredegar v. Windus*, L. R. 19 Eq. 607, 613—615.

(*n*) *Langmaid v. Maple*, 18 C. B. N. S. 255. And note that, under the old practice in equity, where a vendor's suit for specific performance was dismissed on some

ground, which would prevent his succeeding in an action on the contract at law, as his failure to show a good title, the Court would order the return of the deposit with interest, unless the order were intended to be made without prejudice to the vendor's remedy at law; *Anson v. Hodges*, 5 Sim. 227; *Southcomb v. Exeter*, 6 Hare, 213, 225—228; *Webb v. Kirby*, 7 De G. M. & G. 376; *Reale v. Oakes*, 2 De G. J. & S. 518; Sug. V. & P. 641.

(*o*) Above, pp. 38, 768, 775, 776.

(*p*) *Beare v. Fleming*, 13 Ir. Com. Law Rep. 506, 513; *Tredegar v. Windus*, L. R. 19 Eq. 607, 614; and consider *Mortlock v. Buller*, 10 Ves. 292, 318; *Thomas*

would not be precluded from suing on the contract at law (*q*), unless the defence, which he had established to the specific performance of the agreement, involved his own inability to enforce it, as if he had proved that the contract was void for his mistake (*r*) or for illegality (*s*).

Vendor's position at law after his action for specific performance has been dismissed because the title is doubtful.

Vendor may recover damages if the purchaser refuse to take a title as he contracted to take.

If the vendor's action for specific performance be dismissed because the Court considers that the title shown is too doubtful to be forced upon an unwilling purchaser (*t*), it appears that he is not estopped from asserting his remedy at law (*u*). And *at law* the vendor is entitled to recover substantial damages (*x*) from the purchaser if the latter refuse to accept such a title to the land as he had contracted to take, notwithstanding that a Court of Equity, in proceedings for specific performance against the purchaser, would not oblige him to take the title shown, or that to accept the title would expose him to the risk of instant ejectment (*y*). The question is thus raised, What title does the vendor contract to show according to the construction to be placed on the agreement in a Court of law? As we have seen (*z*), where the parties enter into special stipulations restrictive of the purchaser's right to in-

v. Dering, 1 Keen, 729; *Wedgwood v. Adams*, 8 Beav. 103, 105; *Collins v. Carr*, 4 Jur. N. S. 31; *Molden v. Fyson*, 11 Q. B. 292; *Webster v. Cecil*, 30 Beav. 62, 64; above, pp. 88, 204—208, 768, 792.

(*q*) *Hodges v. Litchfield*, 1 Bing. N. C. 492; above, p. 1051; *Simmons v. Heseltine*, 5 C. B. N. S. 551.

(*r*) Above, pp. 747 sq.

(*s*) Above, p. 860.

(*t*) Above, pp. 134, 197, 208, 495; and see next section.

(*u*) See *Chapier v. Deane*, 1 Ves. jun. 565, 566; and consider the cases cited above, p. 1075, n. (*p*), and below, notes (*y*), (*e*), p. 1077. Where a vendor, whose action for

specific performance has been dismissed on the above ground, is entitled to retain a deposit paid to him for the reason that the purchaser has committed a breach of contract in not accepting the title, he must be equally entitled, as an alternative, to sue for damages for the breach; see note (*y*).

(*x*) Above, p. 1062.

(*y*) *Best v. Hamand*, 12 Ch. D. 1, 12; and consider *Re Scott and Alvarez's Contract*, 1895, 2 Ch. 603; above, pp. 204—208; and consider *Rosenberg v. Cook*, 8 Q. B. D. 162; above, p. 179.

(*z*) Above, pp. 38, 77, 88, 204—208, and note (*y*), above.

investigate the title, these are rigidly enforced at law; and unless the vendor has made a misrepresentation sufficient to justify the *rescission* of the contract (*a*), the purchaser is liable in damages for a breach of the agreement, regardless of the fact that in equity the contract is not specifically enforceable or the stipulation is thought to be unfair. With respect to the title contracted to be shown under an open contract, conflicting opinions have been judicially expressed. It has been asserted, on the one hand, that the vendor contracts to show a good marketable title (*b*); and this would oblige him to show such a title as a Court of Equity would force an unwilling purchaser to accept (*c*). But against this it has been decided that, according to the true construction of the contract in a Court of law, the vendor is only obliged to prove such a title as a Court of law shall consider to be good; and that, where the title depends on a doubtful point of law, the Court will decide the question and pronounce definitely whether the title is such as should be accepted or not, without regard to the doctrine of equity concerning doubtful titles (*d*). The weight of authority is in favour of the latter conclusion (*e*). But where the vendor is claiming damages under the contract, the *onus* lies on him of proving his title (*f*); and, as we have seen (*g*), if his

Is the vendor bound at law to show a good marketable title?

(a) See above, p. 826.

(b) *Jeakes v. White*, 6 Ex. 873, 881; diss. Martin, B. Note that this opinion was a *dictum* only, not necessary for the decision in the case.

(c) Above, p. 501.

(d) *Barnum v. Gutch*, 7 Bing. 379. But it should be noted that, as a vendor is bound to show a good title in equity as well as at law (above, pp. 164, 170), it was considered, after some conflict of opinion, that an equitable incumbrance might form a good ground of objection to a title in

a Court of law, even before the Judicature Acts or the Common Law Procedure Act, 1854; Sug. V. & P. 400, 401; *Stevens v. Austen*, 3 E. & E. 685.

(e) See *Simmons v. Heseltine*, 5 C. B. N. S. 554, 569, pointing out that *Barnum v. Gutch* was not cited in *Jeakes v. White*; *Stevens v. Austen*, 3 E. & E. 685, 700; cases cited above, pp. 204—207; Sug. V. & P. 400; 2 Dart, V. & P. 976, 5th ed.

(f) Above, p. 1039.

(g) Above, p. 153 and n.

title depend on proof of a fact, the purchaser is not bound at law to accept it, unless the vendor can prove the fact to be reasonably certain. If a vendor should have expressly contracted to show a good *marketable* title, it is thought that he could not recover damages for the purchaser's refusal to accept the title in case it were too doubtful for a Court of Equity to force upon an unwilling purchaser (*h*).

Defences to an action for damages for breach of the contract.

Here it may be useful to give a brief analysis of the defences which may be made to an action for damages for breach of a contract to sell land. It should be premised that the *onus* lies on the plaintiff of proving the formation of the contract (*i*), his own fulfilment of any condition precedent to the defendant's liability (*k*), and the defendant's breach of the agreement (*l*). The defendant may set up as a defence (1) a denial of the formation of the contract, or (2) a denial of its enforceability, or (3) a denial of its validity, or (4) an assertion of his discharge from the obligation of the contract, or (5) a denial of the plaintiff's performance of all conditions precedent to the defendant's liability, or (6) a denial of the alleged breach. Denial of the formation of the contract is illustrated where the plaintiff asserts and the defendant denies that some letters which have passed between them amount to a binding agreement of sale (*m*); or where the defendant denies that some third person, with whom the plaintiff has contracted or who has signed the memorandum of contract, was his agent having his authority to bind him (*n*). The defence that the alleged contract is not enforceable is raised by a plea of the Statute of

1. Denial of the formation of the contract.

2. Denial of its enforceability.

(*h*) See above, p. 501.

(*i*) Above, pp. 1 *sq.*

(*k*) Above, pp. 1037—1039.

(*l*) Above, pp. 1035—1037.

(*m*) Above, pp. 7—19.

(*n*) Above, pp. 11, 20, and n. (*o*), 21, and n. (*r*), 754, and n. (*q*); below, pp. 1081 *sq.*

(*o*) Stat. 29 Car. II. c. 3, s. 4; above, pp. 3, 11.

Frauds (*o*), or of any Statute of Limitation (*p*). If the defendant must admit the formation, or apparent formation (*q*), of the contract, and cannot take the above-mentioned objections to its enforceability, he may attack the validity of the contract, and may maintain either that it is void *ab initio* or that it is voidable at his option and he has elected to avoid it. The contention that the contract is altogether void is illustrated where the defendant says that, owing to a mistake which he is not estopped from asserting, there was no true consent, and, therefore, no real agreement, between the plaintiff and himself (*r*); also where it is asserted that there has been a mistake, common to both parties, as to some fact, which is a condition precedent to their agreement (*s*); and where it is pleaded that the contract is void for illegality (*t*). The defence that the agreement was voidable at the defendant's option, and that he chooses to avoid it, occurs where he resists the enforcement of the contract on the ground of misrepresentation, whether fraudulent or innocent, duress, or undue influence (*u*); in most cases where he pleads some legal incapacity (*x*); and where he sets up some relative equitable disability in bar of the plaintiff's claim (*y*). The plea of discharge from the obligation of the contract has been considered in the preceding chapter (*z*). The objection, that the plaintiff has not fulfilled some condition precedent to the defendant's liability, is illustrated where the vendor sues for non-acceptance of the title and the defendant denies that a good title has been shown (*a*); or where the purchaser sues for refusal to convey and the vendor denies that the plaintiff was ready to pay the price (*b*); also where the contract was

3. Denial of its validity.

Mistake avoiding the contract.

4. Discharge from the contract.

5. Denial of plaintiff's performance of some condition precedent

(*p*) Above, pp. 1045—1048.

(*q*) Above, pp. 747 *sq.*

(*r*) Above, pp. 748—763.

(*s*) Above, p. 778.

(*t*) Above, pp. 854 *sq.*

(*u*) Above, pp. 805 *sq.*

(*x*) Above, pp. 869 *sq.*

(*y*) Above, pp. 975 *sq.*

(*z*) Above, pp. 1008 *sq.*

(*a*) Above, pp. 578, 1037—1040.

(*b*) Above, pp. 578, 809, 1039, 1040.

6. Denial of the breach.

made subject to some condition precedent, which has not been performed (*e*). A denial of the alleged breach occurs where the defendant admits the contract and does not charge the plaintiff with any default in its performance, but disputes the facts alleged to constitute his own breach of the agreement. Under the present practice any defences which may be taken to an action may be raised in the alternative, notwithstanding that one ground of defence may be inconsistent with another (*d*).

Vendor's position after judgment for or against him.

When judgment has been obtained by or against the vendor for damages for breach of one of main duties (*e*) arising under the contract, his obligation to convey the land sold to the purchaser is merged and extinguished in the judgment (*f*). He is therefore restored to his former position of full owner of the land, and may thenceforth freely deal with it as his own. And it is thought that, on any subsequent sale of the land, a purchaser having notice of the prior contract (*g*) may safely accept the title, if otherwise good, on receiving proof of the judgment (*h*). But the vendor suing or sued for damages for breach of his contract to sell land cannot safely make any disposition thereof contrary to the agreement until judgment has been recovered, for until then the purchaser is not estopped from suing for the specific performance of the contract (*i*). But we have seen (*k*) that the vendor may lawfully exercise

(*e*) Above, p. 1014.

d, *Verdun v. Greenwood*, 3 Ex. D. 251, 255; *Harchesley v. Bradshaw*, 5 Q. B. D. 302; *Emden v. Cottle*, 19 Ch. D. 311, 317; *Re Morgan*, 35 Ch. D. 492, 499, 500. As to the manner of raising defences under the present practice, see R. S. C. 1883, Orders XVIII. rr. 3, 5, XIX., XXI., XXVIII., XXX., and notes

thereto in the Annual Practice.

(*e*) See above, pp. 36, 1039, 1050, 1075.

(*f*) Above, p. 1045.

(*g*) Above, pp. 565, 1060, 1061.

(*h*) Above, pp. 149, 150.

(*i*) Consider *Hipgrave v. Case*, 28 Ch. D. 358; *Cornwall v. Hensson*, 1900, 2 Ch. 298; above, pp. 1073 sq.

(*k*) Above, pp. 1059–1061.

his powers of disposition where the purchaser has committed such a breach of the contract as unquestionably discharges him from his obligation thereunder, and he elects to *rescind* and not to affirm the contract.

In connection with the liability of the parties to a contract for the sale of land to be sued at law for breach of the agreement, it will be convenient to explain the position of the persons interested where one of the signatories to the memorandum of contract professes or is alleged to have signed as agent for a named or for an undisclosed principal (*l*). As a general rule, only the persons named in an agreement as the contracting parties or their representatives in law or their assigns can sue thereon; and the parties alone, or their legal representatives, can be sued thereon at law (*m*). But an exception occurs in the case of principals, who may sue or be sued on contracts made by their agents, with their authority, notwithstanding that they were not named as parties to the agreement (*n*). A contract entered into for the sale of land by one who afterwards professes or is alleged to have been acting as agent for some particular principal may have been made in any of the following states of fact:—(1) The agency may have been disclosed and the principal named in the memorandum. (2) The agency may have been disclosed in the memorandum, but the principal may not have been named therein. (3) Neither the agency nor the name of the principal may have been disclosed in the memorandum, the agent contracting ostensibly on his own account.

Now in all cases where, at the time of entering into a contract, one contractor is made aware that the other

Position of the parties where one signed the memorandum as agent.

Where one contracts with another professedly

(*l*) See above, pp. 3, 11.

(*m*) Above, pp. 527 *sq.*, 540, 542, 544, 558, 570; Wms. Pers. Prop. 181, 16th ed.

(*n*) *Thomson v. Darvillport*, 9 B. & C. 78; 2 Smith, L. C. 379, 11th ed.

acting as agent for a particular principal, the liability of the principal and agent is determined by the parties' intention.

party is contracting with him as agent for a third person named as principal, and the principal has authorised or ratifies the agent's act, the principal is just as much a party to the agreement as if he had contracted in person; and (subject to the effect of the rules of evidence where the contract is put into writing) it is a question of the intention of the parties to be gathered from the terms of the contract and the circumstances of the case, what liabilities the principal and his agent are to incur to the opposite party (*o*). Thus, the parties may by their agreement determine that either the principal or the agent shall be exclusively liable, or that they shall both be liable either severally or jointly, or jointly and severally, and that their liability shall be alternative or cumulative. And the rights of the principal and the agent to enforce the contract are in general correlative to their respective liabilities (*p*). Subject to the principle that the rights and liabilities of any parties to a contract are determined by their intention expressed or to be implied therein, and in the absence of any indication of a contrary intention, the rights and obligations of the persons interested will be ascertained by the following general rules:—

Where the principal is named in the memorandum.

In case (1), where in the memorandum the principal is named and the agent purports to contract on his behalf, the principal, if he previously authorised or subsequently ratified (*q*) the agent's act, has the right to enforce and is liable to perform the agreement, to the exclusion of the agent, who, as a rule, acquires no

(*o*) *Thomson v. Davenport*, 9 B. & C. 78; *Cabler v. Dobell*, L. R. 6 C. P. 486.

(*p*) *Cabler v. Dobell*, L. R. 6 C. P. 486, 493, 494; *Elbinger Actien-Gesellschaft v. Clage*, L. R. 8 Q. B. 313, 317.

(*q*) *Bolton Partners v. Lambert*, 11 Ch. D. 295 (on which case see the note in Fry, Sp. Perf. 711, 3rd ed.); *Re Portuguese Copper Mines, Ltd.*, 45 Ch. D. 16; *Re Teidemann and Lüdermann*, 1899, 2 Q. B. 66.

rights against (*r*) and incurs no liability to the other party to the memorandum (*s*). If, however, the contract were made by deed, then, according to the common law rule that the parties only to an indenture can sue or be sued thereon, the agent alone is liable and he can sue upon the agreement (*t*). But it appears that under the present law the principal being named in though not made a party to the deed might enforce the agreement in so far as it were a covenant respecting any tenements or hereditaments (*u*); or he might enforce the contract under the equitable jurisdiction of the Court, if the provisions of the deed were such as to constitute him a *cestui-que-trust* of the benefit of the agreement (*x*). Again, the established usage of merchants is that, in the absence of express stipulation to the contrary, an agent acting for a foreign principal has no authority to pledge his principal's credit; and on contracts affected by this usage the agent is alone liable or entitled to sue (*y*), in the absence of stipulation to the contrary (*z*). And where at the time of entering into the agreement the principal was not in existence or had not the legal capacity to make the contract, the agent is liable thereon (*a*). An example of this last

Contract made by deed.

Foreign principal.

Where the principal was not in existence, or was incapable of contracting.

(*r*) *Bickerton v. Barrall*, 5 M. & S. 383; *Rimmer v. Grotz*, 15 M. & W. 359, 365.

(*s*) Consider *Downman v. Williams*, 7 Q. B. 103, 111; *Lewis v. Nicholas*, 18 Q. B. 503; *Fowler v. Penton*, L. R. 5 Ex. 169; *Gadd v. Houghton*, 1 Ex. D. 357.

(*t*) *Appleton v. Banks*, 5 East, 118; *Southampton v. Brown*, 6 B. & C. 718; *Beckham v. Drake*, 9 M. & W. 79, 85, 11 M. & W. 315, 317.

(*u*) Stat. 8 & 9 Vict. c. 106, s. 5, applying to deeds executed after the 1st Oct. 1845; *Dyson v. Forster*, 1909, A. C. 98.

(*x*) *Hook v. Kinnear*, 3 Swanst. 417, n.; *Gregory v. Williams*, 3 Mer. 582, 590; *Touche v. Metro-*

politan, &c. Co., L. R. 6 Ch. 671; *Re Empress Engineering Co.*, 16 Ch. D. 125, 129; *Lloyd's v. Harper*, 16 Ch. D. 290; *Re Farrell*, 25 Ch. D. 89; see *Gandy v. Gandy*, 30 Ch. D. 57; *Re Doederland Iron Ore Co., Ltd.*, 1909, 1 Ch. 446.

(*y*) *Armstrong v. Stokes*, L. R. 7 Q. B. 594, 605; *Ellinger Actien-Gesellschaft v. Clage*, L. R. 8 Q. B. 313; *Hutton v. Bullock*, ib. 331, affirmed, L. R. 9 Q. B. 572.

(*z*) *Gadd v. Houghton*, 1 Ex. D. 357.

(*a*) *Kelner v. Baxter*, L. R. 2 C. P. 174; *Scott v. Ebury*, ib. 255, 267.

Contracts by
company
promoters.

doctrine occurs in the case of contracts purporting to be made by an agent on behalf of a company not yet formed. Here the agent is liable upon the contract (*a*), and the company cannot afterwards ratify the agent's act, as such; though it may, of course, enter into a new agreement with the other contracting party to the same effect (*b*). If an agent contract on behalf of a principal named in the memorandum when he has no authority to make the contract, and the principal decline to ratify it, then neither the principal nor the agent (*c*) is liable upon or can enforce the contract; but the other party can sue the agent upon an implied warranty of his authority to make the contract (*d*), or if the agent *fraudulently* misrepresented that he had such authority, in an action of deceit (*e*).

Where the
agent con-
tracts without
the principal's
authority.

Where the
agency is
disclosed, but

In case (2), where in the memorandum the agent professes to contract as an agent for some person

(*a*) See note (*a*), above, p. 1083.

(*b*) *Kelner v. Baxter*, ubi sup.; *Re Empress Engineering Co.*, 16 Ch. D. 125; *Re Northumberland & Alnham Hotel Co.*, 33 Ch. D. 16; *Bugot, &c. Co. v. Clipper, &c. Co.*, 1402, 1 Ch. 146; *Natal Land, &c. Co. v. Pauline Colliery Syndicate*, 1904, A. C. 120, 126; see also *Re English and Colonial Produce Co.*, 1906, 2 Ch. 435; *Re National Motor, &c. Co., Ltd.*, 1908, 2 Ch. 515. By the Railway Construction Facilities Act, 1864 (stat. 27 & 28 Vict. c. 121), s. 30, in the case of companies incorporated by certificate under that Act, contracts relative to the purchase or taking of lands for the railway, and entered into by the promoters before the incorporation of the company by the certificate, shall be as binding on the company as if they had been entered into by the company. Upon the question whether in any other case a contract made by a promoter before the company's incorporation can be speci-

fically enforced against the company, see *Shrewsbury v. North Staffordshire Ry. Co.*, L. R. 1 Eq. 543, 613 *seq.*; Fry, Sp. Perr. §§ 247—255, 3rd ed.

(*c*) *Lewis v. Nicholson*, 18 Q. B. 503.

(*d*) *Collen v. Wright*, 8 E. & B. 617; *Firbank's Executors v. Humphreys*, 18 Q. B. D. 54, 62; *Storkey v. Bank of England*, 1903, A. C. 114; above, p. 839. But the agent is not liable on a warranty of authority where the other party was aware that the agent had no authority to bind the principal, and accepted the agreement for what it was worth subject to the chance of the principal being induced to ratify it; *Halbot v. Len*, 1901, 1 Ch. 344. As to the measure of damages, where the agent is so liable, see *Godwin v. Francis*, L. R. 5 C. P. 295; *Re National Coffee Palace Co.*, 24 Ch. D. 367.

(*e*) *Polhill v. Walter*, 3 B. & Ad. 114; *Randell v. Trimen*, 18 C. B. 783; see above, pp. 823, 825.

interested as principal, but without disclosing the principal's name, the principal, if he had authorised the contract, may declare himself and enforce the contract; he may also be sued on the contract by the other party, if the other can prove that he authorised the agreement (*f*). And if when the contract was made the agent was assuming to act, though without authority, for some principal then in existence and capable of being ascertained, such principal may afterwards ratify the contract and sue or be sued thereon. It is thought, however, that if the agent in making the contract had no principal for whom he assumed to act, but entered into the agreement in the hope that he might afterwards find some person willing to adopt it, the agent's act cannot afterwards be ratified by any person as principal (*g*). The agent's rights and liabilities in the case which we are considering depend on the intention of the parties as expressed in the memorandum of contract (*h*). And it appears that if the terms of the memorandum import no more than a statement of the fact, that the agent is the agent of some person not named, he is *prima facie* liable upon and can enforce the agreement; for it will not be presumed that the other contractor gave credit to the unknown principal exclusively in exoneration of the known agent (*i*). And if on the face of the memorandum the agent be liable, he is not at liberty to prove by parol evidence that the other contractor was aware of the principal's

not the principal's name.

The agent's position.

(*f*) *Thomson v. Davenport*, 9 B. & C. 78; see also *Morris v. Wilson*, 5 Jur. N. S. 168; *Filby v. Housell*, 1896, 2 Ch. 737, 740, 741.

(*g*) Consider *Hagedorn v. Oliver-son*, 2 M. & S. 485; *Foster v. Bates*, 12 M. & W. 226; *Watson v. Swann*, 11 C. B. N. S. 756; *Lypell v. Kennedy*, 14 App. Cas. 437, 456; *Kreghley v. Durant*, 1901.

A. C. 240, 251, 254, 255; *Boston Fruit Co. v. British, &c. Insce. Co.*, 1905, 1 K. B. 637.

(*h*) Above, p. 1081.

(*i*) *Lowndes v. Robinson*, 5 E. & B. 125; *Haugh v. Manzanos*, 4 Ex. D. 104, 106; *Bowen, J., Irvine v. Watson*, 5 Q. B. D. 102, 107; *Hutchinson v. Eaton*, 13 Q. B. D. 861, 865, 868.

name and gave credit to the principal in exoneration of the agent (*k*). But if the true construction of the memorandum be that the agent contracts only on behalf of the undisclosed principal and not on his own account, he can neither sue nor be sued on the agreement (*l*); unless in truth he were acting on his own account and were himself the principal in making the contract. In this event he is at liberty to repudiate his character of agent and adopt the agreement as his own (*m*); and he may be sued thereon by the other party, if the other can prove that he was the real principal (*n*). If the contract purport to be made on behalf of some undisclosed principal, so as to exclude the agent's liability thereon, and in making the contract the agent were acting without the authority of the person for whom he assumed to act, or without any principal at all, and were not himself the real principal, it appears that he would be liable to the other contractor under the doctrine of implied warranty of authority; for he professed to contract on behalf of some particular principal, although he did not name him (*o*). And if in such case the agent both falsely and *fraudulently* represented that he had the authority of some person unnamed to make the contract, he would be liable in an action of deceit (*p*).

Where the memorandum neither discloses any principal's name nor the fact of agency.

In case (3), where a person, who afterwards professes or is alleged to be an agent, ostensibly contracted on his own account, and the memorandum contains no reference to any other person as principal or to the fact of the

(*k*) *Higgins v. Senior*, 8 M. & W. 834; Willes, J., *Culder v. Dobell*, L. R. 6 C. P. 486, 493, 495; see above, p. 781.

(*l*) *Southwell v. Boulditch*, 1 C. P. D. 374; *Gadd v. Houghton*, 1 Ex. D. 357.

(*m*) *Schmaltz v. Avery*, 16 Q. B.

655; *Harper & Co. v. Vigers*, 1909, 2 K. B. 549.

(*n*) *Carr v. Jackson*, 7 Ex. 382.

(*o*) See cases cited above, p. 1084, n. (*d*); and *Cherry v. Colonial Bank of Australasia*, L. R. 3 P. C. 24, 31.

(*p*) Above, p. 1084.

contractor's agency, he is liable upon and can enforce the contract; and he is not at liberty to prove by parol evidence, so as to avoid his liability on the contract, that he was in truth acting as agent for some principal, and that it was agreed that the principal, and not the agent, should undertake the burthen of the contract (*q*). Nor can the other contractor put in such parol evidence to bar the agent's right to sue upon the contract (*r*). But if the one contractor did in fact make the contract as agent for some principal who had authorised him to make it, the principal may, as a rule, sue (*s*) or be sued (*t*) on the contract, and the facts necessary to establish his right or liability may be proved by parol evidence. For such evidence does not contradict or alter the written agreement, but merely adds something to it (*u*). If, however, the terms of the contract were inconsistent with the existence of any undisclosed principal, as where an agent employed to sell land contracts in words, which represent him to be the owner of it, the principal can have no right or liability under the agreement (*x*). And if the principal by words or conduct represented to the other contractor that the agent was contracting or was in a position to contract as principal, he is estopped from alleging that the agreement was made by the agent on his behalf (*y*). Where the contract was made under seal, the principal cannot be sued thereon; nor can he sue to enforce it (*z*), except as *cestui-que-trust* in the agent's name (*a*). If the

Contract inconsistent with the existence of an undisclosed principal.

Representation by the principal that the agent is a principal.

Contract made by deed.

(*q*) Above, p. 1086, n. (*k*).

(*r*) *Higgins v. Senior*, 8 M. & W. 834, 844.

(*s*) *Bateman v. Phillips*, 15 East, 272; *Garrett v. Handley*, 4 B. & C. 664.

(*t*) *Paterson v. Gandasequi*, 15 East, 62; *Re Baker & Salmon's Contract*, 1907, 1 Ch. 238, 243.

(*u*) *Higgins v. Senior*, 8 M. & W. 834, 844; *Beckham v. Drake*, 9 M. & W. 79, 11 ib. 315, 317;

Cabber v. Dobell, L. R. 6 C. P. 486; *Morris v. Wilson*, 5 Jur. N. S. 168; *Filby v. Howells*, 1896, 2 Ch. 737, 740, 741; see above, p. 782, n. (*a*).

(*x*) *Humble v. Hunter*, 12 Q. B. 310.

(*y*) *Ferrand v. Bischoffsholm*, 4 C. B. N. S. 710, 717; *Ramazotti v. Bowering*, 7 C. B. N. S. 851.

(*z*) Above, p. 1083.

(*a*) See *Mollett v. Robinson*,

Principal
subject to
equities
existing
between the
agent and
the other
contractor.

Alternative
liability of
principal or
agent.

undisclosed principal claim to enforce the contract, he can only do so subject to all equities existing between the agent and the other contractor (*b*); he is therefore liable, if he sue upon the contract, to be met with any defence (such as a set-off) which would have been available in an action brought by the agent (*c*). It has been held, however, that this right of the other contractor, to be placed in the same position as if he were being sued by the agent, depends on his having been induced to believe that the agent was acting on his own account; and if he did not enter into the agreement in the positive belief that the agent was contracting as principal, he cannot set up as a defence to an action, brought by the principal on the contract, any set-off or other claim available against the agent alone (*d*). Where a contract is made by an agent on behalf and by the authority of an undisclosed principal, and the agent as well as the principal is liable on the contract (*e*), their liability is, as a rule, alternative (*f*); and it is in the election of the other contractor, after discovering the principal, to sue either the principal or the agent in respect of the agreement. But election to charge the principal on the contract must be made within a reasonable time after his discovery (*g*). This election once made is irrevocable (*h*), but it is not in general finally signified until the one or the other of

L. R. 7 C. P. 84, 119; *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 605; above, p. 1083.

(*b*) *Parker, B., Beckham v. Drake*, 9 M. & W. 79, 98.

(*c*) *George v. Claggett*, 7 T. R. 359; *Sims v. Bond*, 5 B. & Ad. 389, 393; *Isberg v. Bowden*, 8 Ex. 852, 859; *Willes, J., Dresser v. Norwood*, 14 C. B. N. S. 574, 589; *Expte. Dixon*, 4 Ch. D. 133; *Montagu v. Forwood*, 1893, 2 Q. B. 350.

(*d*) *Cooke v. Eshelby*, 12 App.

Cas. 271. But if the other contractor did enter into the agreement in this belief, he will not be deprived of this right by the mere fact that he had the means of knowing that the agent was acting for some principal; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38.

(*e*) Above, pp. 1082, 1087.

(*f*) See above, p. 1082.

(*g*) *Smethurst v. Mitchell*, 1 E. & E. 622.

(*h*) Cf. above, pp. 829, 998.

them has been sued to judgment (*i*). If, however, the other contractor have by words or conduct induced the principal to believe that he has given credit to the agent exclusively for the performance of the contract, and the principal have acted on this belief by settling with the agent in respect thereof, or otherwise altering his position, the other contractor is estopped from suing the principal on the agreement (*k*). And if the other contractor sue the principal on the contract, the principal cannot plead in defence that he put the agent in funds or otherwise provided him with the means of performing the contract, unless the other contractor had by words or conduct induced the principal to believe that he had settled with the agent in respect of the agreement (*l*). Where a man has contracted ostensibly on his own account, not assuming to act as agent for any principal, and had no authority from any principal to make the contract, another person cannot afterwards ratify the agreement as principal, so as to become entitled to enforce or liable to perform it; and the alleged agent alone can sue or be sued thereon (*m*).

Where one contracts ostensibly on his own account and without authority to contract on behalf of some principal, the act cannot be ratified by any person as principal.

Contractor seeking to charge principal must prove that he authorised or ratified the agent's act.

In every case in which a contractor seeks to enforce an agreement, made with him by an agent, against the agent's principal, whether named in or upon making the contract or not, the *onus* lies on him of proving that the principal authorised or ratified the agent's act (*n*). And the principal is not liable upon any contract made by

(*i*) *Priestly v. Fernie*, 3 H. & C. 977; *Caldar v. Dobell*, L. R. 6 C. P. 486, 499; *Curtis v. Widdiamson*, L. R. 10 Q. B. 57; *Mord v. Westwoodland*, 1904, A. C. 11; above, pp. 1045, 1073, 1074.

(*k*) *Wigatt v. Hertford*, 3 East, 147; *Horsfall v. Bantheray*, 10 B. & C. 755; above, p. 1087, n. (*y*).

(*l*) *Hould v. Kemworthy*, 10 Ex. 739, 745; *Irvine v. Watson*, 5 Q. B. D. 414; *Dawson v. Donnell-*

son, 9 Q. B. D. 623.

(*m*) *Wigley v. Inceant*, 1901, A. C. 240.

(*n*) Above, pp. 1081, 1082, 1083, 1087; *Gidaru v. Birch*, L. R. 5 C. P. 299, n.; *Hamer v. Sharp*, L. R. 19 Eq. 108; *Rosenbaum v. Bolton*, 1900, 2 Ch. 267, 268; *Hatchon v. Barnard*, 1903, 2 K. B. 399, reversed, 1904, 2 K. B. 10; *Thames v. Best*, 1907, W. N. 170, 97 L. T. 239.

his agent without his authority (*o*), unless he choose to ratify the agent's act, if it be capable of ratification (*p*), or represented to the other contractor that the agent was authorised to act on his behalf (*q*). On the latter ground, where an agent is invested by his principal with an apparent or ostensible authority, the principal is bound by the agent's acts done within the scope of that authority, notwithstanding that he may have secretly limited (*r*) or revoked it (*s*). On this principle also, where an agent's authority is revoked by law, as in case of the principal's bankruptcy (*t*) or insanity (*u*), the principal or his estate is liable on contracts subsequently made by the agent with a contractor, who had no notice of the revocation of the authority. But this rule has not been applied in the case of revocation by the principal's death (*x*). Where an agent contracts on behalf of his principal, and the contract is within the terms of a written authority given to him, the principal is liable on the agreement, notwithstanding that in making the contract the agent was really acting for his own advantage and not in furtherance of his principal's interest; and this is equally the case, although the other contractor

Agent contracting within his authority but in his own advantage.

(*o*) Above, pp. 1084, 1086, 1089; and previous note; *Chimock v. Marchioness of Ely*, 4 De G. J. & S. 638.

(*p*) Above, pp. 1082, 1085, 1089.

(*q*) *M^cIver v. Humble*, 16 East, 169, 174; and see Wms. Pers. Prop. 428, 16th ed.; and cases cited in the two next notes.

(*r*) *Maddick v. Marshall*, 16 C. B. N. S. 387, 17 C. B. N. S. 829; *Edmunds v. Bushell*, L. R. 1 Q. B. 97; *National Bolivian, &c. Co. v. Wilson*, 5 App. Cas. 176, 205; *Wattau v. Fenwick*, 1893, 1 Q. B. 346; *Kincham & Co., Ltd. v. Parry*, 1910, 2 K. B. 389; and see *Montaigne v. Shatta*, 15 App. Cas. 357; *Bracklesby v.*

Temperance, &c. Bdg. Socy., 1895, A. C. 173.

(*s*) *Trueman v. Leder*, 11 A. & E. 589.

(*t*) *Expte. McDonnell*, Buck, 399; above, p. 738.

(*u*) *Drew v. Num*, 4 Q. B. D. 661; above, p. 738.

(*x*) *Blades v. Free*, 9 B. & C. 167; *Snowd v. Ibbey*, 10 M. & W. 1, 11; above, p. 738; but see per Brett, L. J., *Drew v. Num*, 4 Q. B. D. 661, 668. In this case the agent would, it seems, be liable under the doctrine of implied warranty of authority; *Halbot v. Lens*, 1901, 1 Ch. 344, 349; *Yonge v. Toynbee*, 1910, 1 K. B. 215; above, p. 1084.

did not inquire as to or ask for the production of the agent's authority (*y*).

Here it may be noted that if an owner of land instruct an estate agent to place it on his books and to find a purchaser for him, that does not authorise the agent to enter into an open contract for sale of the land, or indeed to make any firm contract for sale binding the principal (*z*). But definite instructions to sell the land authorise the estate agent to sign, on the principal's behalf, a memorandum of an open contract for sale (*a*).

Authority of an estate agent to make a contract of sale.

A servant of the Crown is not personally liable upon contracts made by him, even by deed (*b*), for the use or on account of the government (*c*). He cannot therefore be made liable in respect of any such contract under the doctrine of implied warranty of authority (*d*). If however the contract were made in his own name and were put in writing without any reference in the memorandum to the fact of his agency for government, he could not adduce parol evidence of the fact in order to escape liability (*e*).

Public servant contracting for the use of government.

§ 3.—Of Specific Performance.

As has been already mentioned (*f*), either party to a sale of land may elect to sue for an order that the contract be specifically performed; and this is the most

(*y*) *Hambro v. Burnand*, 1904, 2 K. B. 10; cf. above, pp. 824, 956.

(*z*) *Hamper v. Sharp*, L. R. 19 Eq. 108; see also *Saunders v. Dence*, 52 L. T. 644, 646; *Chadburn v. Moore*, 61 L. J. Ch. 674; *Thurman v. Best*, 1907, W. N. 170.

(*a*) *Rosenbaum v. Belson*, 1900, 2 Ch. 267.

(*b*) *Unwin v. Wolsley*, 1 T. R. 674; *Allen v. Waldgrave*, 8

Taunt. 566, 574; cf. above, p. 1083.

(*c*) *Macbeath v. Haldimand*, 1 T. R. 172; *Gidley v. Pollockston*, 3 Brod. & Bing. 275; *Palmer v. Hutchinson*, 6 App. Cas. 619.

(*d*) *Dunn v. Macdonald*, 1897, 1 Q. B. 401, 555.

(*e*) Above, p. 1087.

(*f*) Above, pp. 37—39, 1048, 1050, 1073.

Differences
between the
right to
damages and
that to specific
performance.

effective way of enforcing the agreement. In a work like the present it would be out of place to attempt any general account of the law of specific performance; for this the reader is referred to Sir Edward Fry's well-known treatise. We are here concerned only with the subject of specific performance as relating to contracts for the sale of land; and the writer can hardly do more than point out the differences, which exist between the right to recover damages at law for breach of the contract and the right to obtain an order for its specific performance.

The remedy
is purely
equitable.

In the first place, the jurisdiction of the Court to decree the specific performance of a contract is entirely of equitable origin (*g*); and the nature of the remedy is fundamentally different from that of the right of action at law (*h*). The legal remedy is to recover compensation from the party who does not carry out the agreement; so that a breach of the contract is a condition precedent to the right to sue (*i*). In the equitable proceeding it is pronounced that the contract ought to be and shall be carried out as intended (*k*). A breach of the contract is therefore not *necessarily* a condition precedent to obtaining this relief, though it is usually requisite to induce the Court to interfere (*l*). Then the remedy in question is not attendant upon every kind of contract (*m*); but it has always been considered as unquestionably appropriate to contracts for the sale or leasing (*n*) of land (*o*); for the damages recoverable at law for breach of such contracts (*p*) are not in general an adequate compensation to the party injured (*q*).

(*g*) See Wms. Real Prop. 164, 165, and n. c., 21st ed.

(*h*) Fry, Sp. Perf. § 3, 3rd ed.

(*i*) Above, pp. 1035-1037, 1048.

(*l*) Seton on Judgments, 2206, 6th ed.

(*l*) Above, p. 1048.

(*m*) Fry, Sp. Perf. §§ 61-89, 3rd ed.

(*n*) See above, p. 97, n. (*m*).

(*o*) *Barton v. Lister*, 3 Atk. 383, 384.

(*p*) Above, pp. 1062 *sq.*

(*q*) *Harnett v. Fielding*, 2 Sch.

Next, it lies in the judicial discretion of the Court to grant or to withhold the relief in question; though in unobjectionable cases it will be accorded as a matter of course (*r*). And the Court, in exercising this discretion, may have regard to considerations, which do not affect the right to enforce the contract at law, and especially to the parties' conduct (*s*). It follows that the remedy in question is not necessarily to be obtained on mere proof of the facts that an unimpeachable contract was concluded and was broken; facts which would establish the right to recover damages (*t*); for there are several defences to an action for specific performance which are not available in an action on the contract at law.

Lies in the judicial discretion of the Court.

Court may have regard to considerations not attended to at law.

Conversely, there are some cases in which the remedy by specific performance is available to a contractor who has no right to recover damages for breach of the contract (*u*). Thus we have seen that a parol contract partly performed may be ordered to be carried out specifically, although it would be unenforceable at law (*x*). So, if the vendor had made an insubstantial error in the description of the property sold, the resulting deficiency of area or estate would preclude him from enforcing the contract at law; but he might, nevertheless, obtain an order for its specific performance with compensation (*y*). And before the Judicature Acts, when the rule as to time not being essential applied in equity only, a contractor, who was out of time with

In some cases specific performance may be obtained, where there is no right to damages.

& Lef. 549, 553; *Kemney v. Wexham*, 6 Madd. 355, 357; *Adderley v. Dixon*, 1 S. & S. 607, 610; *Fulke v. Gray*, 4 Drew. 651, 657; *Hexter v. Pearce*, 1900, 1 Ch. 341, 346; Fry, Sp. Perf. §§ 62, 72, 3rd ed.

(*r*) Above, p. 37; *Hexter v. Pearce*, 1900, 1 Ch. 341, 346; *Rudd v. Lascelles*, *ib.* 815, 817.

(*s*) Above, pp. 38, 196—198, 204—207, 768, 776, 777, n. (*c*), 778, n. (*f*), 826.

(*t*) Above, pp. 1035—1037, 1048, 1078—1080.

(*u*) Above, p. 1048.

(*x*) Above, p. 13, n. (*o*).

(*y*) Above, pp. 44, 45, 723, 724, 762, 763.

Denial of the formation of the contract.
Denial of the enforceability.

his own performance of the contract, and therefore precluded at law from enforcing the other party's obligation, might still succeed as plaintiff in equity in enforcing the specific performance of the contract (*z*). These cases, however, are exceptional. As a general rule, a plaintiff suing for the specific performance of an agreement to sell land must prove that there is an unimpeachable contract (*a*) existing between himself and the defendant, and that the defendant has failed or refuses to carry it out (*b*). It follows that any defence which could be set up in bar of an action upon the contract at law (*c*), will in general defeat an application for its specific performance. Thus proof that no contract was ever concluded as alleged is, of course, a good defence to an action for specific performance (*d*). As to denying that the contract is enforceable, a plea of the Statute of Frauds will be perfectly effectual in the case of an oral contract (*e*), except on a sale by the Court, or unless

(*z*) Above, pp. 57—60, 575—578, 809, 1078—1080.

(*a*) Above, pp. 1, 2, 747, 869.

(*b*) Above, p. 1048.

(*c*) Above, pp. 1078—1080.

(*d*) See above, pp. 7—19; Fry, Sp. Perf. § 277, 3rd ed. And note that the defence mentioned by Sir E. Fry of the incompleteness of the contract really amounts to a denial either of the formation or of the enforceability of the contract: Fry, Sp. Perf. §§ 337 *sq.*, 3rd ed. It is true that under this head (§§ 355 *sq.*) the learned author discusses the case of a contract to sell at a price to be fixed by some valuer, or two valuers or their umpire; when as a rule the contract is not enforceable unless the price has first been so fixed; above, pp. 60, 61. But in this case the contract to sell is made subject to the condition precedent that the price shall be so fixed, and the condition is such that from its very nature the

Court cannot enforce its specific performance; see above, p. 1014; below, p. 1096, n. (*a*). It should be noted that if the Court consider that the stipulation as to the manner of ascertaining the price is not essential, and that the real agreement is to sell at the fair value, it will direct a reference to ascertain the price; *Milnes v. Gery*, 14 Ves. 400, 407; *Gregory v. Mighell*, 18 Ves. 328, 333; *Gowlay v. Somerset*, 19 Ves. 429, 431; above, p. 61. And the Court has arrived at this result where the main contract has been to buy some land at a fixed price, and there has been a subsidiary agreement to purchase fixtures at a valuation; *Jackson v. Jackson*, 1 Sm. & G. 184; cf. *Darbey v. Whitaker*, 4 Drew. 134; and see *Richardson v. Smith*, L. R. 5 Ch. 648, 652, 654.

(*e*) *Seagood v. Meale*, Prec. Ch. 560; above, pp. 3—11; Fry, Sp. Perf. §§ 498 *sq.*, 3rd ed.

replied to by proof of fraud or part performance (*f*). Lapse of time as a bar to enforcing the specific performance of contracts is, however, governed by the rules of equity respecting laches, and not by the Statutes of Limitation (*g*). The same objections may be taken to the validity of the contract in an action for its specific performance as are available to repel a claim for damages for its breach (*h*). Thus the Court will not specifically enforce a contract void *ab initio* for mistake (*i*) or illegality (*k*), or rendered unlawful by some event which has occurred since its formation (*l*). And where a contract has been formed which is voidable for misrepresentation, whether fraudulent or innocent (*m*), or for duress or undue influence (*n*), and the injured party elects to avoid it, that will prevent the other from enforcing its specific performance (*o*). And any legal incapacity (*p*), or relative equitable disability (*q*), which goes to make a contract void or voidable, may be set up against a claim for its specific performance. Discharge from the obligation of the contract is in general an equally good defence (*r*); but we have seen that in the case of a discharge by bankruptcy from the legal obligation of the contract, the equitable liability to perform it specifically may remain unimpaired (*s*). So also it is in general a good defence that the plaintiff has not performed some condition precedent to the defendant's liability under the agreement (*t*); but, as we have

Denial of its validity.

Discharge from the contract.

(*f*) Above, pp. 12—14, 1093; Fry, Sp. Perf. §§ 561 *sq.*, 3rd ed.

(*g*) Above, p. 1049; Fry, Sp. Perf. §§ 1071 *sq.*, 3rd ed.

(*h*) Above, p. 1078.

(*i*) Above, pp. 752, 778.

(*k*) Above, p. 860; Fry, Sp. Perf. §§ 477 *sq.*, 3rd ed.

(*l*) Above, p. 866; Fry, Sp. Perf. § 477, 3rd ed.

(*m*) Above, pp. 811, 813 *sq.*

(*n*) Above, pp. 839 *sq.*

(*o*) Fry, Sp. Perf. §§ 1020, 1059, 3rd ed.

(*p*) Above, pp. 869 *sq.*; Fry, Sp. Perf. §§ 270 *sq.*, 487 *sq.*, 3rd ed.

(*q*) Above, pp. 975 *sq.*

(*r*) Above, pp. 1008 *sq.*, 1079.

(*s*) Above, pp. 545, 547, 551, 1023, 1044.

(*t*) Above, p. 1079. Fry, Sp. Perf. §§ 922 *sq.*, 3rd ed.; and consider *Royon v. Paul*, cited above, p. 1052, n. (*m*).

Denial of the
breach.

seen, to bar the plaintiff's claim to enforce the contract specifically, it is not enough to prove his non-performance of some stipulation which is essential at law—it must be shown that the stipulation broken is such as a *Court of Equity* considers to be essential (*u*). As regards the defence of a denial of the facts alleged to constitute a breach of the contract (*x*), it has been explained that proof that no breach of contract has occurred does not appear to displace the Court's *jurisdiction* to decree specific performance, but is in general a good ground for asking the Court not to exercise it, or at least to make the plaintiff pay the costs (*y*).

Defences to a
claim for
specific per-
formance
which would
not be avail-
able at law.

We will now consider what defences may be set up against a claim for specific performance of the agreement which would not be available to bar an action for breach of the contract at law.

Defence that
the Court has
no jurisdic-
tion to grant
specific per-
formance.

We must first notice the defence that the contract is not of that kind which the Court will order to be specifically performed (*z*)—in other words, that the Court has no jurisdiction so to enforce it (*a*). We have

(*u*) Above, pp. 1093, 1094; Fry, Sp. Perf. §§ 50, 51, 3rd ed.

(*x*) Above, pp. 1035, 1080.

(*y*) Above, pp. 1048, 1092.

(*z*) See Fry, Sp. Perf. Chap. II. §§ 47 *sq.*, 3rd ed.

(*a*) The following are the grounds on which the Court has refused to assume jurisdiction so to interfere: (1) that the common law remedy exists and is adequate; (2) that the contract is from its nature such as the Court cannot perform; (3) that it would be useless to enforce specific performance; (4) that the Court would be unable to enforce its own judgment; (5) that the enforced performance of the contract would be worse than its non-performance; and (6) that the

agreement, though made by deed, is voluntary. On the first ground, the Court declined to assume the jurisdiction in the case of ordinary mercantile contracts for the sale of goods, or contracts for the sale of Government stock: but jurisdiction to order the specific performance of a sale of goods was conferred by the Sale of Goods Act, 1893 (stat. 56 & 57 Vict. c. 71), s. 52. The second ground appears to comprehend the case of a sale of land at a price to be named by a single valuer or two valuers or their umpire; above, pp. 60, 61, 1014, 1094, n. (*d*). The fourth ground is the reason alleged for the rule that the Court will not specifically enforce a building or repairing

seen (*b*) that this plea is inapplicable to a simple sale (*c*) of land. But an agreement partly in the nature of a sale of land may contain some stipulation which by itself alone the Court will not enforce specifically, as an agreement of personal service or employment (*d*) or to build (*e*), or to repair (*f*), or to do continuous acts, as to work mines (*g*); and it must be considered how far this defence is available where an agreement of this kind is incorporated in a sale of land.

Contract for sale of land comprising a stipulation not specifically enforceable.

As a rule, where some stipulation which the Court cannot specifically enforce forms an integral part of an executory (*h*) contract, the Court will not decree specific performance of the rest of the agreement; for unless the Court can so enforce the entire contract, it will not grant this relief (*i*). And this is equally the case

As a rule the Court will not order specific performance unless the entire contract can be so enforced.

contract or a contract to do continuous acts, as to work mines. On the fifth ground the Court will not order specific performance of a positive contract of service or employment. See Fry, Sp. Perf. §§ 47 *sq.*, 3rd ed. Sir Edward Fry also mentions among the limits of the jurisdiction the cases where the plaintiff has elected to pursue some other remedy (see above, pp. 1073—1076), and where the jurisdiction has been taken away by statute; but these are not grounds on which the Court has never assumed the jurisdiction; they are reasons why an assumed jurisdiction should not be exercised.

(*b*) Above, pp. 1092, 1093.

(*c*) Above, pp. 1, 266, 381, *n.* (*c*).

(*d*) *Pickering v. Bishop of Ely*, 2 Y. & C. C. 249, 267, 268; *Stocker v. Brockelbank*, 3 Mac. & G. 250, 266; *Johnson v. Shrewsbury, &c. Ry. Co.*, 3 De G. M. & G. 914; *Whitwood Chemical Co. v. Hardman*, 1891, 2 Ch. 416, 426, 432; Fry, Sp. Perf. §§ 110—115, 3rd ed.

(*e*) *Kay v. Johnson*, 2 H. & M.

118, 124; *Ryan v. Mutual Tontine, &c. Assn.*, 1893, 1 Ch. 116, 128; *Wolverhampton Corpn. v. Emmons*, 1901, 1 K. B. 515, 523, 524; Fry, Sp. Perf. § 98, 3rd ed.

(*f*) *Flint v. Brandon*, 8 Ves. 159; *Paxton v. Newton*, 2 Sm. & G. 437, 440.

(*g*) *Booth v. Pollard*, 4 Y. & C. Ex. 61; *Pollard v. Clayton*, 1 K. & J. 462; *Blackett v. Bates*, L. R. 1 Ch. 117; *Powell, &c. Co. v. Tuff Vale Ry. Co.*, L. R. 9 Ch. 331; Fry, Sp. Perf. § 99, 3rd ed.

(*h*) This rule has no application where an injunction is sought to restrain a breach of some stipulation contained in an executed contract; *Wolverhampton, &c. Ry. Co. v. London and North Western Ry. Co.*, L. R. 16 Eq. 433, 439; Fry, Sp. Perf. §§ 841—844, 3rd ed.

(*i*) *Gervais v. Edwards*, 2 Dr. & War. 80; *Nickels v. Hancock*, 7 De G. M. & G. 300, 327; *Stocker v. Wedderburn*, 3 K. & J. 393; *Ogden v. Fossick*, 4 De G. F. & J. 426; *Merchants' Trading Co. v. Banner*, L. R. 12 Eq. 18, 23; *Frith v. Frith*, 1906, A. C. 254, 261; Fry, Sp. Perf. §§ 821, 830—835, 3rd ed.

Where the stipulation is severable from the rest of the contract.

Where the stipulation is to covenant to do some act.

Where the stipulation is for the plaintiff's benefit, and is unperformed through the defendant's default.

whether the stipulation is to be performed by the plaintiff or the defendant; for though the plaintiff might submit to perform it, the Court could not enforce it specifically, if he failed to observe his submission (*k*). Thus, if part of the consideration for a contract to convey land be an agreement of personal service or employment, or to do continuous acts, as to work mines, the Court will not order the contract to be specifically performed (*l*). If, however, a contract contain an agreement to sell land, together with other stipulations, and be made in such terms that the contract for the sale of the land is complete in itself and severable from the rest of the agreement, the sale alone may be specifically enforced (*m*). In such cases the question, whether the sale is complete in itself and severable from the rest of the agreement, is, of course, a question of the parties' intention, to be gathered from the terms of the agreement (*n*). And where the stipulation really is, not that the contractor shall do acts which the Court would not enforce specifically, but that he shall covenant to do such acts, the rule does not apply, as the Court will oblige him to execute a deed of covenant (*o*). Where the stipulation is for the plaintiff's benefit, so that he might have waived it and then enforced the contract specifically (*o*), and it is not performed owing to the defendant's default, the Court may, since Lord Cairns' Act (*p*), order specific performance of the rest of the

(*k*) *Stocker v. Wedderburn*, 3 K. & J. 393; *Ogden v. Fossick*, 4 De G. F. & J. 426; Fry, Sp. Perf. § 834, 3rd ed. But if the stipulation is to be performed by the defendant, the plaintiff may waive its performance, and so obtain an order for the specific performance of the rest of the contract; *Soames v. Edge*, John. 669, 672, 673.

(*l*) Above, p. 1024.

(*m*) *Croome v. Lediard*, 2 My. & K. 251; *Richardson v. Smith*, L.

R. 5 Ch. 648; *Odessa Tramways Co. v. Mendel*, 8 Ch. D. 235; *Starkey v. Barton*, 1909, 1 Ch. 284, 290, where an order was made for specific performance of a contract of sale containing a stipulation that part of the purchase money should be left on mortgage; Fry, Sp. Perf. § 822.

(*n*) *Granville v. Betts*, 18 L. J. N. S. Ch. 32; *Wilson v. West Hartlepool Ry. Co.*, 2 De G. J. & S. 475, 488, 495.

(*o*) Above, n. (*k*).

(*p*) Stat. 21 & 22 Vict. c. 27,

contract, and give damages for breach of the stipulation (*q*). The rule regarding building contracts (*r*) is subject to the exception that the Court will specifically enforce an agreement to erect buildings or execute other works on land where these conditions are satisfied: (1) that the works to be carried out be sufficiently ascertained; (2) that the plaintiff's interest in their completion be such that damages would be no adequate compensation for non-performance of the agreement; and (3) that the defendant be in possession of the land on which the works are to be done (*s*). If, therefore, a stipulation be made on the sale of land that the purchaser shall erect a house or other buildings, or make a road, on the land sold (*t*), and the land be conveyed or possession thereof be given to him pursuant to the contract, the agreement to build may be specifically enforced against him, provided it be sufficiently certain and the vendor's interest in its performance would not be adequately satisfied by payment of damages (*u*). This would be the case where the sale was made in consideration of a rentcharge to be reserved to the vendor (*x*), or where he would have an interest in the

Conditions in which a building contract will be specifically enforced.

which gave to the Court of Chancery jurisdiction to award damages in addition to or substitution for specific performance; see *Lewers v. Shaftesbury*, L. R. 2 Eq. 270. This Act was repealed by stat. 46 & 47 Vict. c. 49, but saving the jurisdiction thereby established; see *Sayers v. Collyer*, 28 Ch. D. 103, 107, 108; *Re R.*, 1906, 1 Ch. 730.

(*q*) *Soames v. Edge*, John. 669; *Samuda v. Lawford*, 4 Giff. 42; *Kay v. Johnson*, 2 H. & M. 118; *Middleton v. Greenwood*, 2 De G. J. & S. 142; *London Corp. v. Southgate*, 38 L. J. Ch. 141; Fry, Sp. Perf. §§ 849, 850, 3rd. ed.

(*r*) Above, p. 1097.

(*s*) *Wolverhampton Corp. v. Emmons*, 1901, 1 K. B. 515, 525

(adopting the rule stated in Fry, Sp. Perf. § 103, 3rd ed., and based on *Storer v. Great Western Ry. Co.*, 2 Y. & C. C. C. 48; *Sanderson v. Cockermouth, &c. Ry. Co.*, 11 Beav. 497; *Lytton v. Great Northern Ry. Co.*, 2 K. & J. 394; *Wilson v. Furness Ry. Co.*, L. R. 9 Eq. 28; *Molynse v. Richard*, 1906, 1 Ch. 34.

(*t*) Above, pp. 492, 674.

(*u*) See *Mosely v. Virgin*, 3 Ves. 184, 186; *Wilson v. Northampton, &c. Ry. Co.*, L. R. 9 Ch. 279.

(*x*) Above, pp. 672, 673, consider *Mosely v. Virgin*, 3 Ves. 184, where, however, specific performance was refused on the ground of uncertainty; *Soames v. Edge*, John. 669; *London Corp.*

use or maintenance of the buildings, works, or road, either by way of reservation or as an adjoining landowner, or as one of the public (*y*). On the same principle, where it is part of an agreement to sell land that the vendor shall execute works on adjoining land of his own, the agreement may be specifically enforced against him (*z*). It may be observed that the exception thus established seems to do away with the alleged ground of the rule (*a*) as to the non-enforcement of building contracts, viz., that the Court could not carry out its judgment (*b*); and there is some authority to the effect that the Court has jurisdiction to order specific performance of a building contract if sufficiently certain (*c*). But in a recent case upon the subject the rule was affirmed by the Court of Appeal, and the exception defined as above stated (*d*).

Agreement to pay a fixed sum as a penalty or as liquidated damages for breach of contract.

It may be observed that the Court does not consider an agreement to pay a fixed-sum, in case of a breach of contract (*e*), whether as a penalty or as liquidated damages, to be a good ground for ousting its jurisdiction to enforce specific performance (*f*). To effect this it is necessary that the agreement shall really be to do

v. *Southgate*, 38 L. J. Ch. 141; *Cubitt v. Smith*, 10 Jur. N. S. 1123.

(y) *Prior v. Penzance Corp.*, 4 Hare, 506; and cases cited in n. (y), above, p. 1099.

(z) Consider *Wells v. Maxwell*, 32 Beav. 408, 9 Jur. N. S. 565, 1021.

(a) Above, p. 1096, n. (a).

(b) See Collins, L. J., *Wolverhampton Corp. v. Emmons*, 1901, 1 K. B. 515, 524.

(c) *Mosely v. Virgin*, 3 Ves. 184, 185; *Hepburn v. Leather*, 50 L. T. 660. In the latter case Bacon, V.-C., decreed specific performance of a covenant by a purchaser contained in the con-

veyance to him to erect buildings on adjoining land of the vendor. It is submitted, however, that in this case damages would have been an adequate compensation to the vendor, who, on receiving the cost of the works, might have executed them on his own land without any loss to himself.

(d) *Wolverhampton Corp. v. Emmons*, 1901, 1 K. B. 515.

(e) Wms. Pers. Prop. 194, 16th ed.

(f) *Howard v. Hopkyns*, 2 Atk. 371; *French v. Macale*, 2 Dr. & War. 269, 274 sq.; *Coles v. Sims*, 5 De G. M. & G. 1, 11; *Bird v. Lake*, 1 H. & M. 111.

some act or else to pay a sum of money instead, so that it shall be in the election of the contractor to pay the money as a *performance* of the contract, and not as a penalty or as damages for its non-performance (*g*).

Apart from the question of the existence of the jurisdiction to grant specific performance (*h*), the defences, not available at law, to a claim for specific performance appear to be these:—(1) The uncertainty of the contract; (2) unfairness, including innocent misrepresentation not amounting to a cause for rescinding the contract; (3) hardship; (4) mistake; (5) that to carry out the contract would involve a breach of some superior equity; (6) want of mutuality; (7) the plaintiff's not continuing ready and willing to perform his part of the agreement; (8) his laches; and (9) the doubtfulness of the title. Of each of these in turn.

Defences not available at law.

As to the uncertainty of the contract, if at law the agreement be void for uncertainty, there can be no question of enforcing its specific performance; in that case no contract has been concluded (*i*). But it may be a defence to a claim for specific performance of a contract that the acts agreed to be done are not defined with sufficient certainty to enable the Court to decree their performance *in specie*; notwithstanding that those acts may be sufficiently ascertainable to enable the Court to award damages for their non-performance (*k*). Thus specific performance has been refused of a contract

Uncertainty of the contract.

(*g*) See *French v. Macale*, 2 Dr. & War. 269, 275; Fry, Sp. Perf. §§ 140–164, 3rd ed.

(*h*) Above, p. 1096.

(*i*) Above, p. 1094.

(*k*) *Mosely v. Virgin*, 3 Ves. 184; *Hodges v. Horsfall*, 1 Russ. & My. 116; *Stuart v. London and North Western Ry. Co.*, 1 De G.

M. & G. 721; *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & G. 119; *Taylor v. Portington*, 7 De G. M. & G. 328; *Greenhill v. Isle of Wight, &c. Ry. Co.*, 19 W. R. 345; *Pearce v. Watts*, L. R. 20 Eq. 492; *Douglas v. Bryans*, 1908, A. C. 477, 486; Fry, Sp. Perf. §§ 380 *sq.*, 3rd ed.

"to lay out 1,000*l.* in building" on particular lands, because of its uncertainty, although in other respects the conditions which induce the Court to enforce a building contract (*l*) were satisfied (*n*).

Unfairness.

With regard to unfairness, it has been laid down, generally, that an agreement must be fair, or the Court will not order its specific performance (*u*). This proposition, however, is not now construed in the sense that the Court will not specifically enforce any contract, unless the advantages to be secured by the parties be reasonably equivalent, or their conduct be distinguished by a higher degree of good faith than the law ordinarily exacts from contractors. Indeed, it hardly amounts to more than an assertion that the Court, in exercising its discretion to grant this remedy, may have regard to considerations of unfairness either in the terms of the agreement or in the parties' conduct in making the bargain. Thus we have seen (*o*) that at the present day the better opinion is that the Court will not refuse specific performance of a contract to sell land on the sole ground of inadequacy of consideration; although unfairness in the terms of a bargain coupled with circumstances of inequality in the parties' position may be evidence of undue influence or fraud (*p*). So also it has been mentioned (*q*) that, according to the latest authority, a vendor of land may enforce the sale specifically, notwithstanding that he kept silence as to a latent defect of quality known to himself (*r*). In these respects it does not appear that a higher standard of conduct is required in equity than at law (*r*). Still, there may be such unfairness about a contract that the

(*l*) Above, p. 1099.

(*m*) *Moseley v. Virgin*, 3 Ves. 184.

(*n*) *Hardwicke, C., Buxton v. Foster*, 3 Atk. 383, 386; *Rossllyn, C., Walpole v. Oxford*, 3 Ves. 402,

420; *Fry, Sp. Perf.* § 334, 3rd ed.

(*o*) Above, p. 849.

(*p*) Above, pp. 846—849.

(*q*) Above, p. 767.

(*r*) Above, pp. 767, 849.

Court will decline to order its specific performance, although the facts would not warrant an order for its rescission. An example of this occurs in the case of innocent misrepresentation (*s*); and the same rule is applicable in the case of any unfairness in the nature of fraud or undue influence, but not amounting exactly to a cause for setting the agreement aside (*t*). A notable example occurs in the case of *Twining v. Morrice* (*u*), where specific performance of a contract to sell land was refused to the purchaser, because he had (in perfect good faith) employed the solicitor known to be acting for the vendor to bid for him at the auction, a circumstance which the Court considered likely to damp the sale. In that case the Court acquitted the parties of all moral blame. As regards the sale of land, the most prominent instances of unfairness occur in connection with the statement in the contract of the nature of the vendor's title or of the interest offered for sale or of conditions restrictive of the purchaser's right to investigate the title. In these respects the contract is in equity *uberrimæ fidei* (*x*); and if anything be unfairly stated or suppressed so as to mislead the purchaser, he may resist specific performance of the contract, although the facts may not support a claim to rescind the contract and recover the deposit (*y*).

Twining v. Morrice.

The defence of innocent misrepresentation not amounting to a cause of rescission of the contract has been already considered (*z*). It appears to be an example of the application of the general principle that the Court may have regard to the fairness of the parties' con-

Innocent misrepresentation not amounting to a cause of rescission.

(*s*) Above, p. 826.

(*t*) *Willan v. Willan*, 16 Ves. 72, 83; Fry, Sp. Perf. § 387, 3rd ed.; see above, p. 768, and n. (*d*).

(*u*) 2 Bro. C. C. 326.

(*x*) Above, pp. 768, and n. (*c*),

769, and n. (*f*), 825; *Brandling v. Plummer*, 2 Drew. 427, 429.

(*y*) Above, pp. 38, 73, n. (*h*), 196—198, 204—207, 209, 211, 826.

(*z*) Above, p. 826, and nn. *g*, *h*.

duct (*a*). On this ground the Court is enabled to reject a claim for specific performance by a party whose statement or conduct has been misleading, though it has not amounted to a false representation inducing the contract (*b*).

Hardship.

We have seen (*c*) that the Court may decline to grant the remedy of specific performance on the ground that it would work great hardship on the defendant. But the defence of hardship, like that of unfairness (*d*), cannot be set up to avoid carrying out what is commonly called a hard bargain; that is to say, where the sole ground of objection is really the inadequacy of the consideration (*e*). Like unfairness also, hardship is usually asserted in connexion with other circumstances, such as mistake. And it has been shown that, where a man has been induced to enter into a contract by his own mistake, and it would work great hardship on him to oblige him to carry it out, the Court will decline to enforce specific performance against him, notwithstanding that, being estopped at law from asserting his own mistake (*f*), he has no defence to an action for damages for breach of the contract (*g*). Still, in some cases, hardship alone appears to be a sufficient defence (*h*). Thus the Court has declined to grant specific performance of a contract to buy a close of land entirely surrounded by the lands of strangers to the agreement, which provided no certain means of access (*i*). And it has been observed that the Court will not enforce specific performance of a contract to buy a property which would be positively

(*a*) Above, p. 1102.

(*b*) Consider *Denny v. Hancock*, L. R. 6 Ch. 1; above, p. 826, and nn. (*g*, *h*).

(*c*) Above, pp. 768, 775—777; and see Fry, Sp. Perf. §§ 417 sq., 3rd ed.

(*d*) Above, p. 1102.

(*e*) Above, pp. 848, 849; *Haywood v. Cope*, 25 Beav. 140, 150—

153.

(*g*) Above, pp. 750—755, 761, 774 sq.

(*g*) Above, pp. 724, 726, 775—777.

(*h*) See cases cited above, p. 768, n. (*e*).

(*i*) *Denne v. Light*, 8 De G. M. & G. 774.

noxious to its purchaser—such as a house so used as to subject its possessor to legal penalties, or so infected with the germs of disease that it is dangerous to enter it (*k*). And specific performance has been refused on the ground that the result would inevitably be to subject the defendant to a forfeiture (*l*).

Mistake, as a ground for resisting the specific performance of a contract, has already been fully considered (*m*). Mistake.

The Court will not enforce specifically a contract of which the performance would be in contravention of some superior equity affecting the subject of the agreement; as where the completion of a sale of land would involve a breach of trust, or a breach of a prior contract affecting the land in equity (*n*). This rule has been referred to the grounds of unfairness and hardship (*o*); but its true reason appears to be that the Court will not stultify itself by ordering the specific performance of an act which would be in exact contravention of the rules of equity—the very rules which the Court sits in its place to uphold (*p*). It is thought that the principle of the rule is apparent when it is considered that this defence may be raised by either party; even by a contractor who, in entering into the agreement, had contemplated a breach of his own duty, against a plaintiff who had contracted without notice of the breach of duty Contract involving a breach of some superior equity.

(*k*) Above, p. 771.

(*l*) *Faine v. Brown*, cited 2 Ves. sen. 307; *Peacock v. Penson*, 11 Beav. 355; see *Helling v. Lumley*, 3 De G. & J. 493, 498.

(*m*) Above, pp. 774—778.

(*n*) *Mortlock v. Buller*, 10 Ves. 292, 312; *Harnett v. Fielding*, 2 Sch. & Lef. 549, 554; *Ord v. Noel*, 5 Madd. 438; *Wood v. Richardson*, 4 Beav. 174, 176, 177; *Thompson v. Blackstone*, 6 Beav. 470; *Rede v. Oakes*, 4 De G. J. &

S. 505, 512, 513, 515; *Willmott v. Barber*, 15 Ch. D. 96, 107; *Dunn v. Flood*, 28 Ch. D. 586, 590; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, 1900, 2 Ch. 352, 366, 367, 1901, 2 Ch. 37, 51; *Corbett v. South Eastern & Chatham Ry. Co.'s Managing Committee*, 1905, 2 Ch. 280, 287, reversed, 1906, 2 Ch. 12.

(*o*) Fry, Sp. Perf. § 407, 3rd ed.

(*p*) See note *n*, above.

involved (*g*). Here the defendant could hardly plead unfairness or hardship, when it was his own disregard of his duty that placed him in a difficult position (*r*).

Want of
mutuality.

The defence of want of mutuality is the objection that the defendant, owing to the plaintiff's legal incapacity or otherwise, would have no right to enforce the agreement specifically as against the plaintiff, so that the remedy is not mutual. Where this is the case the Court will decline to grant specific performance at the plaintiff's suit (*s*). We have seen that on this ground an infant is precluded from so enforcing any contract made with him (*t*); and a married woman subject to the common law could not pursue this remedy in case of her agreement to sell or buy land (*u*). It is said that, as a rule, the Court, in considering this objection, has regard to the time of making the contract (*x*); and it is true that if the remedy were then mutual, a party who has subsequently lost his right to specific performance by his own conduct, as by his laches, cannot plead want of mutuality against the other party, who is not in default (*y*). But it is established that where the remedy was not mutual at the making of the contract, but the party not originally bound has subsequently, being then *sui juris*, confirmed the contract, he may enforce the contract specifically, and cannot be met with the defence of want of mutuality. Thus we have seen (*z*) that, on this principle, a party who has not signed the memorandum of a contract to sell land may enforce specific performance against one

(*g*) *Ord v. Noel*, 5 Madd. 438; and consider *Dance v. Goddingham*, L. R. 8 Ch. 902, 911, 913; and see above, pp. 265, and n. (*m*), 266.

(*r*) Consider *Helling v. Lumley*, 3 De G. & J. 493.

(*s*) *Hamilton v. Grant*, 3 Dow. 33, 42; *Flight v. Bolland*, 4 Russ. 298, 301; *Peckering v. Bishop of Ely*, 2 Y. & C. C. C. 249, 267.

(*t*) Above, p. 883.

(*u*) Above, pp. 925, 926, 936.

(*x*) Fry, Sp. Perf. §§ 460, 463, 3rd ed.

(*y*) *South Eastern Ry. Co. v. Kintt*, 10 Hare, 122, 125, 126; *Hawkes v. Eastern Counties Ry. Co.*, 1 De G. M. & G. 737, 755, 5 H. L. C. 331, 365.

(*z*) Above, p. 883, and n. (*i*).

who has signed the memorandum; and an infant, after he has attained full age, might formerly so enforce a contract made during infancy; for in these cases the plaintiff necessarily submits to perform his part of the agreement, and so affirms his liability thereunder. So where a principal has ratified a contract made on his behalf, but without his authority, by his agent (*a*), he can enforce the contract specifically, notwithstanding the original want of mutuality (*b*). And the same rule applies in every case in which a contract was at first voidable at the option of one of the parties, but he has elected to affirm it (*c*). Conversely, where one party to a contract is originally in no position to enforce it, owing to his inability to perform some essential stipulation (*d*), and the other waives this objection and continues to treat the contract as still subsisting, the latter cannot plead the original want of mutuality if the former, having become enabled to perform the stipulation, sue for specific performance of the agreement. Thus where a vendor of land cannot show a good title according to the contract, and the purchaser does not insist on this objection as putting an end to the agreement, but negotiates with the object of removing it, and the vendor subsequently acquires a good title, the vendor may sue for specific performance of the contract, and the purchaser cannot rely on the original want of mutuality (*e*). From these instances it appears that what is fatal to a claim for specific performance is want of mutuality at the time of bringing the action (*f*); though a defendant who has lost this remedy by his own misconduct is precluded from taking such an objection. Similarly, want of mutuality cannot

a Above, p. 1082.

b Consider *Firth v. Greenwood*, 1 Jur. N. S. 866.

c Above, pp. 812, 828, 852, 997.

d Above, p. 1096.

e Above, pp. 168, 169, and n. 1; and see p. 185, n. 1.

f *Hewes v. Eastern Counties Ry. Co.*, 1 De G. M. & G. 757, 755, 5 H. L. C. 331, 365.

Contract
subject to a
condition
precedent.

be pleaded in bar of a purchaser's right to enforce specific performance with compensation (*g*) ; for, as we have seen (*h*), in such case the vendor is estopped from asserting his own want of a complete title. Where a contract for sale of land is subject to some condition precedent (*i*) to be performed by one of the parties, it is, of course, no objection to enforcing it specifically after the condition has been performed, that there was previously no mutuality of remedy (*k*) ; for until performance of the condition there was no enforceable agreement (*l*).

The plaintiff's
not con-
tinuing ready
and willing to
perform his
part of the
contract.

When a man sues for the specific performance of a contract he must show that he has ever been and continues to be ready and willing to perform his part of the agreement (*m*). Not only, therefore, must he have performed or have been ready and willing to perform all stipulations on his part, which are regarded in equity as essential (*n*), up to the time of bringing his action, but if he *subsequently* do any act which precludes him from carrying out his part of the contract, that will afford a defence to his claim ; and this defence may be taken by a defendant who has himself broken the contract. Thus, if a purchaser of land make default in carrying out the contract, and the vendor sue to enforce it specifically, it will be a good defence that the vendor has *subsequently* made some sale or other disposition of the land, which effectually prevents him from completing the contract (*o*). This would be no defence to a claim by the vendor for damages for the purchaser's breach of contract (*o*).

(*g*) Fry, Sp. Perf. §§ 473—476, 3rd ed.

(*h*) Above, pp. 724, 725.

(*i*) Above, p. 1014.

(*k*) See *Weeding v. Weeding*, 1 J. & H. 424, 425, a case of an option to purchase duly exercised ;

Fry, Sp. Perf. § 465, 3rd ed.

(*l*) Above, p. 1014.

(*m*) Fry, Sp. Perf. § 922, 3rd ed.

(*n*) Above, p. 1096.

(*o*) *Hupgrave v. Case*, 28 Ch. D. 356 ; see above, p. 1080.

It is well established that the Court will not grant or Laches. enforce the relief of specific performance of a contract, unless the party seeking this remedy apply promptly, that is, as soon as the nature of the case will permit (*p*), and diligently prosecute the proceedings, when once his action has been brought (*q*). No particular time can be specified within which an action for specific performance of a sale of land must necessarily be brought, in order to prevent the defence of laches. Each case will be judged according to its own particular circumstances; and the question is whether proceedings have been commenced within a reasonable time (*r*). Where one party has taken some objection and declines to complete the contract in the manner proposed by the other, there is of course no necessity for the other to take proceedings, so long as the parties are negotiating with a view to the removal of the objection. But when once such negotiations have been declined or broken off, and the other party has been definitely informed that the objector insists on his objection and claims to repudiate the contract on that account, the other should lose no time in instituting proceedings, if he intend to claim specific performance of the contract (*s*). Of course, he need not issue a writ or a summons on the very next day; he is no doubt entitled to a reasonable time to obtain advice as to his rights in the matter and to consider such advice when obtained. But he must be prompt both in consulting counsel and in making up his mind. In such circumstances a delay of one year

(*p*) *Milward v. Thorold*, 5 Ves. 720, n.; *Eads v. Williams*, 4 De G. M. & G. 674, 691; *Mills v. Haywood*, 6 Ch. D. 196, 202; *Levy v. Stogdon*, 1898, 1 Ch. 478, 484, affd. 1899, 1 Ch. 5; Fry, Sp. Perf. §§ 1100—1102, 3rd ed.
 (*q*) *Moore v. Blake*, 1 Ball & B. 62, 69.

(*r*) *Husham v. Howells*, 21 W. R. 570, 571; see *Howe v. Smith*, 29 Ch. D. 89, 91.

(*s*) See *Walker v. Jeffreys*, 1 Hare, 341, 348; *Southcomb v. Bp. of Exeter*, 6 Hare, 243, 249, 220; *Parkin v. Thorold*, 16 Beav. 59, 73; *Lehmann v. McArthur*, L. R. 3 Ch. 496, 504.

has been held to be fatal (*t*); and where the nature of the property sold is such as to make time of the essence of the contract (*u*), as in the case of a sale of a leasehold colliery, even a period of three months and a half has been considered too long (*x*).

Doubtfulness
of the title.

As to the doubtfulness of the title as a defence to an action for specific performance, it is established that the Court will not oblige the purchaser to perform specifically a contract for the sale of land, if the title shown by the vendor be such as the Court considers too doubtful to force upon an unwilling purchaser (*y*). We have seen (*z*) that it is a condition precedent to the enforcement of a contract for the sale of land that the vendor shall show a good title to the property sold, and that this rule appears to be of equitable origin. On the principle that he who seeks equity must do equity, Courts of Equity would not grant the extraordinary relief of a decree for specific performance against a purchaser of land, unless the vendor proved that he had the right to convey what he had contracted to sell and could show good title for its secure enjoyment by the purchaser (*a*). On this ground it was established that in every suit for specific performance of a sale of land, whether brought by the vendor (*a*) or the purchaser (*b*), it is the pur-

(*t*) *Watson v. Reid*, 1 Russ. & My. 236; see also *Heaphy v. Hill*, 2 S. & S. 29; *Southcomb v. Bp. of Exeter*, 6 Hare, 213; *Eads v. Williams*, 4 De G. M. & G. 674.

(*u*) Above, pp. 59, 576.

(*x*) *Glasbrook v. Richardson*, 23 W. R. 51; see also *Hucham v. Llewellyn*, 21 W. R. 570, 766.

(*y*) *Maxlow v. Smith*, 2 P. W. 198; *Shapland v. Smith*, 1 Bro. C. C. 75; *Cooper v. Denne*, 4 Bro. C. C. 80, 1 Ves. jun. 565; *Sheffield v. Mulgrave*, 2 Ves. jun. 526; *Roake v. Kidd*, 5 Ves. 647; *Van-*

couver v. Bliss, 11 Ves. 458, 464—466; *Sloper v. Fish*, 2 V. & B. 149; *Blosse v. Clannorris*, 3 Bligh. 62, 71; *Willeox v. Bellaers*, T. & R. 491; *Pycke v. Waddingham*, 10 Hare. 1, 7, *sq.*; *Collard v. Sampson*, 4 De G. M. & G. 224; *Parker v. Tootal*, 11 H. L. C. 143, 158; above, pp. 134, and nn (*c*, *e*), 197, 208, 361.

(*z*) Above, pp. 94, 809, 810, 1039.

(*a*) Above, p. 94 and n. (*b*).

(*b*) *Bennett v. Fowler*, 2 Beav. 302; see above, p. 88.

chaser's right (*c*) to have an inquiry directed, whether a good title can be made to the property sold (*d*); that is, a good title according to the contract (*e*). If the Court consider the title to be good, the purchaser must carry out the contract (*f*), subject of course to his right of appealing from the judge's decision. If it be certified that a good title cannot be made, he is entitled to rescind the contract or to claim damages for its breach (*g*). But the decision of the Court as to the validity or invalidity of the title is only binding on the parties to the action and those claiming under them (*h*); and the Courts of Equity have considered that, before a purchaser of land shall be obliged to perform the contract specifically, he shall (subject to the special stipulations contained in the agreement) have such a title as he in his turn will be able to force upon purchasers from him (*i*). Hence it is that if the Court consider it to be doubtful whether the title attains this standard, the Court will simply decline to enforce the contract *specifically* (*k*), without prejudice, as it appears (*l*), to the

Inquiry as to title.

(*c*) The right is the purchaser's only; *Bennett v. Fowler*, 2 Beav. 302, and the vendor is not entitled to raise any objection to his own title; *Bradley v. Muntton*, 15 Beav. 460.

(*d*) Above, p. 166, n. (*n*).

(*e*) *Upperton v. Nickolson*, L. R. 6 Ch. 436, 442; above, p. 88 and n. (*x*). The inquiry as to title takes place in the judge's chambers; any point in dispute may be referred to one of the conveying counsel to the Court for his opinion; after which the point raised may be discussed before the master, and, if necessary, reserved for the decision of the judge in chambers or in court. The decision of the Court as to the title is then embodied in the master's certificate, which becomes binding on all parties to the action, unless within eight

days an application be made to discharge or vary it: R. S. C. 1883, Ords. LI. r. 7, LV. rr. 65, 69, 70; Dan. Chan. Pract. 1136, 7th ed.; Dan. Chan. Forms, 767, 5th ed.; 2 Dart, V. & P. 1099, 5th ed.; 1228, 6th ed.; 1110, 7th ed.; Fry, Sp. Perf. §§ 1372, 1376, 3rd ed.

(*f*) Seton on Judgments, 2248, 6th ed.

(*g*) *Ib.* 2249; above, pp. 1039, 1050—1053, 1075.

(*h*) *Rose v. Calland*, 5 Ves. 186, 188, 189; *Pyrke v. Waddingham*, 10 Hare, 1, 10; *Osborne to Rowlett*, 13 Ch. D. 774, 781; *Re Ailesbury Settled Estates*, 62 L. J. Ch. 1012.

(*i*) See *Braybroke v. Inskip*, 8 Ves. 417, 428; *Pyrke v. Waddingham*, 10 Hare, 1, 8.

(*k*) Above, p. 1110 and n. (*y*).

(*l*) Above, pp. 1076—1078.

vendor's right to retain the deposit or to recover damages for the purchaser's refusal to perform the agreement.

It is impossible to state exhaustively in what circumstances the Court will consider a title too doubtful to be forced upon an unwilling purchaser. The practice of the Court has fluctuated; and even the principles upon which it acts are by no means perfectly ascertained (*m*). By the labours of Sir Edward Fry (*n*), the decisions on this subject have been partially classified, and the substance of this classification is given below.

Reasonable
probability of
litigation.

In the first place, the Court will not oblige the purchaser to take the title where it is reasonably probable that its acceptance would involve him in litigation (*o*). In other words, the Court will not compel the purchaser to buy a law suit (*p*). But the litigation contemplated must be such as, in the opinion of the Court, may possibly be successful (*q*). And if a stranger to the contract assert some claim on the land sold, which the Court considers to be entirely unfounded, the Court will enforce the contract specifically, notwithstanding that the stranger have commenced proceedings against

(*m*) See cases cited, below, p. 1113, n. (*x*); Fry, Sp. Perf. §§ 882—888, 3rd ed.

(*n*) Fry, Sp. Perf. §§ 890, 891, 3rd ed. The reader is also referred to the summary of cases on this subject contained in 2 Dart, V. & P. 1137, 5th ed.; 1272, 6th ed.

(*o*) *Cattell v. Corvall*, 4 Y. & C. Ex. 228, 237; *Pegler v. White*, 33 Beav. 103; *Re New Land Development Assn. and Gray*, 1892, 2 Ch. 138, 145, 146, 147; *Scott v. Alvarez*, 1895, 2 Ch. 603, 613 (above, pp. 206—208); *Re Hollis's Hospital and Hague's contract*,

1899, 2 Ch. 540, 555 (above, p. 678, n. (*s*)).

(*p*) *Rose v. Culland*, 5 Ves. 186, 187; *Sharp v. Adcock*, 4 Russ. 374, 375.

(*q*) See *Liddal v. Weston*, 2 Atk. 19; *Glass v. Richardson*, 9 Hare, 698, 701; *Falkner v. Equitable Reversionary Society*, 4 Jur. N. S. 1214, 1217, 1218 (the remarks referred to in the text are not reported in S. C., 4 Drew. 352); *Mogridge v. Clapp*, 1892, 3 Ch. 382, 396; *Re Maskell and Goldfinch's contract*, 1895, 2 Ch. 525, 529; *Re Marshall and Salt's contract*, 1900, 2 Ch. 202, 204, 205.

the vendor, and registered them as a *lis pendens* (*r*). Possibly the whole sum and substance of the rule about too doubtful titles is contained in the proposition that specific performance will not be decreed against a purchaser if it would expose him to the risk of litigation at suit of a stranger to the contract asserting, with apparent or reasonably possible right (*s*), a claim adverse to the title shown (*t*). But the following points should be particularly mentioned, though perhaps they are merely corollaries to this proposition.

As regards doubtful questions of law:—The Court considers the title too doubtful where there has been a decision of a Court of co-ordinate jurisdiction adverse to the title or to the principle on which the title depends, although the Court thinks that decision to be wrong (*u*); or where there has been a similar decision favourable to the title, but the Court is of opinion that the decision was not right (*u*). But at the present time the Court of Appeal, or other superior Court, does not consider the title to be too doubtful merely because a Court of inferior jurisdiction has pronounced a decision adverse to the title, if the Superior Court think that decision to be clearly wrong (*x*). Again, the Court will not oblige

Questions of law :
previous adverse decision of equal Court, though doubted.
Previous favourable decision doubted.
Adverse decision of inferior Court.

r *Bull v. Hatchens*, 32 Beav. 615; above, pp. 593, 594, 678, n. (*s*); see also *Osbaldstone v. Askew*, 1 Russ. 160; *Minton v. Kirwood*, L. R. 1 Eq. 449, 455, 3 Ch. 614.

s) Cf. above, p. 1067.

t) See above, p. 1112.

u) *Mullings v. Trender*, L. R. 10 Eq. 449, 454; and see *Rose v. Calland*, 5 Ves. 186. This rule applies equally where there have been previous conflicting decisions of Courts of co-ordinate jurisdiction; *Re Carter and Kenderdine's contract*, 1897, 1 Ch. 776, 778.

x) *Bainley v. Carter*, L. R. 4 Ch. 230, 236, 240; *Alexander v. Mills*, L. R. 6 Ch. 124, 132;

Railford v. Wallis, L. R. 7 Ch. 7; *Collier v. Walters*, L. R. 17 Eq. 252, 260; *Oshorne to Rickett*, 13 Ch. D. 774, 781; *Re Carter and Kenderdine's contract*, 1897, 1 Ch. 776. In earlier cases it had been held that the Court would not enforce specific performance, notwithstanding that its opinion was in favour of the title, if it considered that that opinion might fairly and reasonably be questioned by competent persons; *Meehan v. Smith*, 2 P. W. 198, 201; *Price v. Strange*, 6 Madd. 159, 164; *Pyche v. Waddingham*, 10 Hare, 1, 7, 8; *Collier v. McBean*, L. R. 1 Ch. 81, 84;

Title depending on the construction of an ill-drawn instrument.

Title depending on a question of general law.

Title depending on some general rule of construction.

Title depending on the construction of a general statute.

a purchaser to take a title depending on the construction and legal operation of some ill-expressed and inartificial instrument, if the Court consider that its own view of the question is open to reasonable doubt in some other Court (*y*). But if the title depend on a question of the general law of the land, the Court will, as a rule, decide the question and, if its opinion be in favour of the title, order the specific performance of the contract by the purchaser (*z*). And this rule applies also where the question, though one of construction, turns upon a general rule of construction, unaffected by any special context in the instrument (*a*). It has been held that, where the title depends on the construction of some general statute, the true construction thereof may, owing either to the absence of any decision or to the conflict of previous decisions, be regarded by the Court as a question sufficiently doubtful to justify the Court in not enforcing the contract specifically as against the purchaser (*b*). But the latest expression of judicial opinion in the Court of Appeal is that in this case also a Superior Court will follow the modern general rule, and will decide the question of construction; and, if necessary, oblige the purchaser to take the title accordingly (*c*).

Questions of fact.

With respect to questions of fact:—The Court may consider the title too doubtful where it depends on the

Hamilton v. Buckmaster, L. R. 3 Eq. 323, 328; *Fry, Sp. Perf.* § 884, 3rd ed.

(*y*) *James, L. J., Alexander v. Mills*, L. R. 6 Ch. 124, 132; see *Re Nichols and Van Joel's contract*, 1910, 1 Ch. 43.

(*z*) *James, L. J., Alexander v. Mills*, L. R. 6 Ch. 124, 132; *Forster v. Abraham*, L. R. 17 Eq. 351, 354; *Osborne to Rowlett*, 13 Ch. D. 774; *Re Carter and Kenderdine's contract*, 1897, 1 Ch. 776.

(*a*) *Radford v. Willis*, L. R. 7 Ch. 7, 11.

(*b*) *C. A., Palmer v. Locke*, 18 Ch. D. 381, 388; *Re Thackwray and Young's contract*, 40 Ch. D. 34, 38, 39.

(*c*) *Mogridge v. Clapp*, 1892, 3 Ch. 382, 396, 401; *Re Carter and Kenderdine's contract*, 1897, 1 Ch. 776; *Cozens-Hardy, L. J., Re Handman and Wilcox's contract*, 1902, 1 Ch. 599, 609; see also *Wentworth v. Humphrey*, 11 App. Cas. 619, 622, 625, 626.

establishment by oral evidence of facts of a complicated nature (*d*); especially where the witnesses necessary to repel an adverse claim may be dead or difficult to find when the claim is asserted (*e*). And where the title depends on a presumption of fact, it is considered to be too doubtful if it would be the duty of a judge charging a jury upon the evidence offered, not to direct them that they were bound to find in favour of the presumption, but to leave them to draw their own conclusion from the evidence (*f*). This principle is illustrated where a title depends upon some fact of a negative nature, which is not capable of positive proof, but is really a matter of inference only (*g*). Thus we have seen that a purchaser will not be forced to accept a title depending on the fact that the vendor had no notice of some equitable incumbrance (*h*). Other examples of the application of this rule are where the fact to be established is that there was no creditor capable of taking advantage of an act of bankruptcy by the vendor (*i*), or that a voluntary settlement was not avoided under the old law by a subsequent conveyance for value (*k*). But where the title depends on a fact, which is capable of positive proof and is satisfactorily proved (*l*), or where it depends on a presumption of fact, and a judge would be bound to direct a jury to find in favour of the presumption, the purchaser will be obliged to perform the contract specifically (*m*). The Court may

Title depending on a presumption of fact.

(*d*) *Re Douglas and Powell's contract*, 1902, 2 Ch. 296, 314.

(*e*) Fry, Sp. Perf. § 890 (i), 3rd ed.

(*f*) Above, pp. 134 and n. (*e*), 156.

(*g*) Above, p. 132.

(*h*) Above, pp. 134, 197, 495.

(*i*) *Lowes v. Lush*, 14 Ves. 547.

(*k*) Above, pp. 133, 393, 395.

(*l*) *Smith v. Death*, 5 Madd. 371, 374; and see *Spencer v.*

Topham, 22 Beav. 573 (above, pp. 1006, 1007); *Re Bridges and McRae's contract*, 30 W. R. 539; *Games v. Bonnor*, 54 L. J. Ch. 517, 33 W. R. 64; *Kekewich, J., Mogridge v. Clapp*, 1892, 3 Ch. 382, 392, 393.

(*m*) Above, p. 134; *Re Summerson*, 1900, 1 Ch. 112, n.; *Hepworth v. Pickles*, ib. 108; see also *Clippens Oil Co. v. Edinburgh, &c. Trustees*, 1904, A. C. 64, 69, 70.

Where the facts raise a presumption of the invalidity of the title.

Mere suspicion of an equitable defect.

Suspicion of a fact affecting the title at law.

consider the title too doubtful, where the facts stated in support of it raise the presumption (though not an irrebuttable presumption) that it is invalid in some respect; as that an appointment abstracted was a fraud upon the power (*n*). On the other hand, where the facts neither amount to proof nor raise any presumption of the invalidity of the title, but merely give ground for a *suspicion* of fraud or other like defect, which might render the title invalid in equity, and a good title to the legal estate is shown on the face of the abstract (*o*), the Court will not absolve the purchaser from the obligation of performing the contract specifically (*p*). It should be noted, however, that if the facts stated raise a suspicion of some defect in the title *at law*, the purchaser will have no protection in case the suspicion be well-founded (*q*). The law applicable to these circumstances appears to be this:—On the one hand, the Court will never presume fraud (*r*); the presumption is that everything has been rightly done (*s*); and the vendor is entitled to the benefit of this rule, and cannot be called upon to give evidence to disprove any mere suggestion by the purchaser of some hypothetical fact, which would adversely affect the title (*t*). But against this, it appears that where there is a real ground of suspicion of some matter which would cause a defect in the *legal* title to the property sold, the Court may, unless the suspicion be removed by sufficient evidence, pronounce the title to be too doubtful to be forced on

(*n*) *Warde v. Dixon*, 28 L. J. N. S. Ch. 315, 321; Fry, Sp. Perf. § 890 (vi), 3rd ed.; see above, pp. 297, 1002, n. (*b*).

(*o*) See above, pp. 239, 297, 1002, n. (*b*).

(*p*) *McQueen v. Farquhar*, 11 Ves. 467; *Green v. Putsford*, 2 Ben. v. 70; and see *Cockerott v. Sutcliffe*, 25 L. J. Ch. 313, 2 Jur. N. S. 323; *Re Hush's Charity*, L. R. 10 Eq. 5, 10; *Alexander v.*

Mills, L. R. 6 Ch. 124, 132; Sug. V. & P. 393, 779.

(*q*) Above, pp. 136, 334 and n. (*b*), 920, 921, 1003, 1004.

(*r*) *Alderson, B., Cattell v. Corral*, 4 Y. & C. Ex. 228, 236; Williams on Commons, 3.

(*s*) Above, p. 118; *Clippens Oil Co. v. Edinburgh, &c. Trustees*, 1904, A. C. 64, 69; *Heath v. Deane*, 1905, 2 Ch. 86, 93.

(*t*) Sug. V. & P. 392.

the purchaser, or may at least do so if its acceptance would leave him exposed to the reasonable probability of adverse litigation (*u*).

The effect of a judgment for specific performance, or of the dismissal of an action for specific performance, upon the right to recover damages at law for breach of the contract has been already considered (*x*); and the question has been particularly discussed of the vendor's right to damages, where his action for specific performance is dismissed because the Court considers the title too doubtful (*y*).

Effect of judgment for specific performance in barring action on the contract at law.

In a vendor's action for specific performance, if upon the inquiry into title the certificate be against the title (*z*), there has, of course, been such a breach of the contract as justifies the purchaser in rescinding it (*a*); and the defendant may consequently claim, in the

Certificate against the title in vendor's action.

(*u*) See *Hartley v. Smith*, Buck, 368, 380; *Cattell v. Cornwall*, 4 Y. & C. Ex. 228, 237; and consider *Grace v. Bastard*, 2 Ph. 619. 1 De G. M. & G. 69, where the undue influence alleged would have rendered the will invalid at law. It is respectfully submitted that Sir Edward Fry, in his statement of the law (Sp. Perf. §§ 891 (vi.), 892, 893, 3rd ed.), does not lay sufficient stress on the distinction pointed out by Leach, V-C., in *Hartley v. Smith*, *ubi sup.*, between the suspicion of a defect affecting only the equitable title (where the purchaser, if attacked, could shield himself by the plea of purchaser for value of the legal estate without notice of the defect) and a suspicion, for which there is apparently reasonable ground, that the facts are in truth such as would avoid *at law* some assurance stated as part of the title.

(*x*) Above, pp. 1073—1078. It may also be noted that judgment for specific performance *against*

either party to the contract will preclude him from successfully suing for damages at law: for, as a general rule, the judgment could not have been pronounced if the other party had committed a breach of contract (above, p. 1096), so *that* question is concluded between them. And in the cases where a man may obtain an order for specific performance, notwithstanding that he has broken the contract at law (above, pp. 1093, 1094), the other party would, under the old practice, have been restrained from suing on the contract at law; so that he has now no right to bring such an action; *Levy v. Lindo*, 3 Mer. 81; *Reynolds v. Nelson*, 6 Madd. 290; *Beaufort v. Glynn*, 3 Sm. & G. 213, 226; and see *Garbutt v. Francis*, 1 Ch. D. 155; *Wright v. Redgrave*, 11 Ch. D. 24.

(*y*) Above, pp. 1076—1078.

(*z*) Above, p. 1111 and n. (*c*).

u. Above, pp. 1037, 1050, 1051.

vendor's action, to have an order for repayment of his deposit, with interest thereon, and establishing his lien on the land sold for the deposit and interest and his expenses of investigating the title (*b*).

Specific performance at suit of the purchaser.

If the *purchaser* of land sue for the specific performance of the contract, he is, as we have seen (*c*), entitled to an inquiry as to the title; but he takes this inquiry at his own risk. For if he be aware of objections to the title, and upon the inquiry the vendor fail to prove a good title according to the contract (which is all that he can be called upon to show), the purchaser must either waive his objections to the title, and pay the costs of the inquiry into title, or else he must submit to have his action for specific performance dismissed without costs (*d*). If he accept the latter alternative, he will not be precluded from suing at law for damages for the vendor's breach of contract, but he will be unable to recover from the vendor, as damages, his own costs of his action for specific performance (*e*). So also, if the vendor had disclosed such a title as the purchaser was bound to accept, and the purchaser subsequently sued for specific performance and claimed an inquiry into title, the purchaser would have to pay the costs of the inquiry. And if, in such case, the purchaser had raised objections to the title, which the Court would not uphold, and he had no other cause of complaint than the vendor's refusal to admit these objections, the purchaser would have to pay the vendor's costs of the action (*f*). The difference between the purchaser's position in proceedings for specific per-

(*b*) *Kitton v. Hewett*, 1904, W. N. 21; and see *Re Farnham and Aird's contract*, 1906, W. N. 215; above, pp. 1051-1051.

(*c*) Above, pp. 1110, 1111.

(*d*) Above, p. 88.

(*e*) Above, pp. 88, n. (*x*), 1070, 1075.

(*f*) See *Lyle v. Yarrowburgh*, John. 70; *Phillipson v. Gibbon*, L. R. 6 Ch. 428, 434.

formance brought against him by the vendor, and that which he occupies in case he bring such an action himself, is a matter of the greatest importance to a conveyancer advising the purchaser on title. We have seen that in many cases a purchaser may resist specific performance at the vendor's suit unless the vendor produce a better title than he has contracted to show; whilst if, in the same circumstances, the purchaser seek actively to enforce his own right to specific performance of the contract, he will be obliged to accept such a title as, according to the construction placed on the agreement in a Court of *law*, the vendor has stipulated that he will provide (*g*).

The cases, in which the vendor or purchaser is entitled to obtain an order for specific performance of the contract with compensation for some error of description, have been already discussed in connection with the subject of the completion of the contract (*h*).

Specific performance with compensation.

If either party to a sale of land fail to comply with an order of the Court that he shall perform the contract specifically (*i*), the other may at his election adopt one of two courses (*k*). First, he may apply to the Court to enforce the judgment. That is to say, he may obtain an order fixing a time and place for conveyance and payment of the purchase money, or fixing a time within which the judgment for specific performance is to be obeyed, and in default of compliance with this order he may proceed against the disobedient party for contempt (*l*). And if the party in default be the vendor, the purchaser may obtain a conveyance of the land to

Failure to comply with a judgment for specific performance. Proceedings to enforce the judgment.

Vesting order.

(*g*) Above, pp. 38, 88, 196—198, 204—207, 210, 211, 768, 770, 776, 826.

(*h*) Above, pp. 722—732.

(*i*) Above, p. 1092.

(*k*) Fry, *Sp. Perf.* §§ 1171—1173, 3rd ed.; Seton on Judgments, 2285, 6th ed.

(*l*) Seton on Judgments, 2285—2287, 6th ed.

Order for
rescission of
the contract.

Enforcing the
vendor's lien.

himself by means of a vesting order or an order appointing a person to convey under the Trustee Act, 1893 (*m*). Secondly, in case of failure to comply within a reasonable time with a judgment for specific performance, or to comply with an order fixing a time for completion, the party not in default may obtain an order for the rescission of the contract (*n*). Besides these remedies, if the purchaser were the party in default, the vendor may apply to the Court to enforce his lien for the unpaid purchase money (*o*) and to obtain an order for a re-sale by the Court to realise the amount due thereon (*p*), or for liberty to exercise an express power of re-sale reserved to him by the contract (*q*).

Jurisdiction
of County
Courts in
specific per-
formance.

The County Courts have jurisdiction in actions for the specific performance of any agreement for the sale

(*m*) Stat. 56 & 57 Vict. c. 53, ss. 26—34; above, p. 536, n. (*y*); Seton on Judgments, 2287, 2288, 6th ed.; and see stat. 47 & 48 Vict. c. 61, s. 14.

n Above, pp. 1051, n. *m*, 1055, n. (*f*), 1074, n. (*d*). This case appears to form an exception to the rule that an election once exercised to affirm or rescind a contract cannot afterwards be revoked (above, pp. 829, 998); for by obtaining judgment for specific performance of the agreement the party had previously affirmed it; above, pp. 1050, 1073, 1074; see *Baker v. Williams*, 62 L. J. Ch. 315. It is thought that the ground of this exception is that, if one party commit a contempt of Court in disobeying an order that he shall perform the contract specifically, this is such an absolute repudiation of his duty under the contract that it would be a hardship to oblige the other to carry out the agreement and not to allow him to recede from it. The writer has followed Sir Edward Fry's statement (above, p. 1119,

n. (*k*)), that in the above-mentioned circumstances rescission may be claimed by either party to the contract; but he has not found any reported case in which the contract has been rescinded on the purchaser's application. But if the principle above suggested be correct, the purchaser should be equally entitled to the relief of rescission in case the vendor refuse to convey. Apart from statute, which now enables the purchaser to obtain a vesting order, the purchaser would have had no remedy to obtain a conveyance if the vendor did not choose to be coerced by the processes of attachment or sequestration; and in that case it would be obviously inequitable to hold him to the contract.

(*o*) Above, pp. 506, 1026.

(*p*) Above, pp. 53, n. (*b*), 1032, 1060, 1061; Seton on Judgments, 2290.

q, *Shuttleworth v. Chous*, 1910, 1 Ch. 176; see above, pp. 1059, 1060, and n. (*e*).

or purchase of any property, where the purchase money does not exceed the sum of 500*l.* (*r*). It has been held that this jurisdiction exists where the contract is for the sale of an equity of redemption for a price not exceeding 500*l.*, although the amount of the price, together with that of the charges on the property, exceed that sum (*s*).

§ 4.—*Of a Vendor and Purchaser Summons.*

At the present time, when a vendor and purchaser of land are at variance upon some matter, which prevents the completion of the contract, and neither of them will give way, they usually prefer to submit the point at issue to the Court in a Vendor and Purchaser summons (*t*); and if the question between them can be decided in such proceedings, it appears that this is the proper course to take (*u*). Vendor and Purchaser summonses owe their origin to the Vendor and Purchaser Act, 1874 (*x*), which enacted that a vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by

Vendor and
Purchaser
summons.

(*r*) Stat. 51 & 52 Vict. c. 43, s. 67 (4).

(*s*) *R. v. Judge Whitcomb*, 1904, 1 K. B. 827.

(*t*) Above, pp. 39, 1050.

(*u*) See *King v. Chamberlayne*, 1887, W. N. 158, 159.

(*x*) Stat. 37 & 38 Vict. c. 78, s. 9, also providing for similar applications to a judge of the Court of Chancery in Ireland.

whom all or any of the costs of and incident to the application shall be borne and paid.

Parties are in the same position as on a reference as to title in an action for specific performance.

Whatever could be done in chambers upon a reference as to title under a decree for specific performance, when the contract was established (*y*), can be done upon proceedings under this enactment. It enables the parties to put themselves in chambers in exactly the same position in which they would have been, with all the rights which they would have had, under the old form of decree. Evidence by affidavit may therefore be given, and the deponents may be cross-examined (*z*).

Questions proper to be decided in a V. & P. summons.

The principal questions proper to be decided in a Vendor and Purchaser summons are questions of the construction of the contract (*a*), questions as to the sufficiency of the vendor's title (*b*), and questions as to conveyance and the form of the conveyance (*c*) and the adjustment of accounts in view of the completion of the contract (*d*). In fact, as a general rule, all questions may be so decided which may arise between a vendor and purchaser on the assumption that there is an unimpeachable contract of sale existing between them, and which must be cleared up before the parties can proceed to completion.

Questions affecting the validity or existence of the contract.

It will be observed that the Court has no jurisdiction to decide in a Vendor and Purchaser summons any question affecting the existence or validity of the contract. If, therefore, the contention of either party be that no contract was ever formed, or that the contract is not enforceable (as for non-compliance with the

(*y*) Above, p. 1111 and n. (*e*).

(*z*) *Re Burroughs, Lynn and Sexton*, 5 Ch. D. 601.

(*a*) See *Re Hughes and Ashley's contract*, 1900, 2 Ch. 595.

(*b*) See cases cited above, pp. 1052, 1053, n. (*g*).

(*c*) See above, pp. 164, 165, 181, 640, n. (*e*), 641, n. (*x*).

(*d*) Above, pp. 712 *sq.*

Statute of Frauds (*e*)), or that it is void for mistake or illegality, or voidable for misrepresentation, fraudulent or innocent (*f*), for duress or undue influence, or by reason of any relative equitable disability (*g*), the dispute cannot be settled in a Vendor and Purchaser summons, but the party, who insists on his rights, must assert them by action. It is held, however, that if the controversy between the parties include any question which may properly be determined on a Vendor and Purchaser summons and would require to be settled in case the contract were valid, the Court may decide it in such proceedings, notwithstanding that the validity of the contract (as in case of an alleged misrepresentation) be also disputed (*h*). We may also note that, as the Act particularly confers jurisdiction to determine claims of compensation, the Court may decide on summons any question respecting that particular form of misrepresentation which consists in failure to show title to the whole property described in the contract, and which is properly the failure to deliver the entire article contracted for (*i*).

Court may decide any question proper to be dealt with, though the validity of the contract be also disputed.

The excluded questions affecting the existence or validity of the contract (*k*) appear to be such conten-

Objections to specific performance

(*e*) Above, pp. 3—11.

(*f*) *Re Davis and Carey*, 40 Ch. D. 601, 607—609; *Re Hughes and Ashley's contract*, 1900, 2 Ch. 595, 602, 604; above, pp. 205, 828, n. (*u*).

(*g*) Above, p. 1079.

(*h*) *Re Hughes and Ashley's contract*, 1900, 2 Ch. 595. In *Re Lander and Bagley's contract*, 1892, 3 Ch. 41, it was decided, on the ground that any question of the construction of the contract may properly be determined in a V. & P. summons, that under a contract to grant a lease, not particularly specifying from what day the term was to run, it was

intended that the term was to commence on a particular day, notwithstanding that one of the parties raised the contention that the omission to name the day rendered the contract void for uncertainty. This seems to be an extreme instance of the exercise of the jurisdiction.

i, See *Re Terry and White's contract*, 32 Ch. D. 14; *Re Fawcett and Holmes*, 42 Ch. D. 150; *Re Hare and O'More's contract*, 1901, 1 Ch. 93; *Re Puckett and Smith's contract*, 1902, 2 Ch. 258; above, pp. 722—732, 828.

(*k*) Above, pp. 1121, 1122.

which would
be no defence
at law.

tions as put in issue the existence or validity of the contract *at law*: and it appears that, as the contractors are in the same position on a Vendor and Purchaser summons as if they were parties to an action for specific performance of their agreement (*l*), they are not precluded from raising in such a summons any objection to carrying out the contract, which would be a good ground of defence to an action for specific performance, but not to an action for breach of the contract at law (*m*). For example, either party may so raise any objection to the performance of the contract on the ground of unfairness, including such innocent misrepresentation or such non-disclosure of some matter of title as would *not* avail to set aside the contract at law (*n*). It appears too that an objection to perform the contract specifically on the ground of mistake, coupled with hardship (*o*), might well be raised in a Vendor and Purchaser summons, especially as it would probably involve the resistance of a claim for compensation (*p*). And the defence that the title is too doubtful to force upon an unwilling purchaser may be raised in such proceedings (*q*). Here it may be remarked that in a Vendor and Purchaser summons the position of each party, as regards the specific performance of the contract, is determined, not by the incident of his having taken out or being a respondent to the summons, but by the contention, which he raises therein. Thus we

The parties' position varies according to the contention raised by either.

(*l*) Above, p. 1122.

(*m*) See above, pp. 1101 *sq.*

(*n*) *Re Marsh and Earl Granville*, 24 Ch. D. 11; *Re Davis and Cavey*, 40 Ch. D. 601; *Re National Provincial Bank of England and Marsh*, 1895, 1 Ch. 190; *Re Hardicke and Lipski's contract*, 1901, 2 Ch. 666 *sed quare*, whether in this case the learned judge was right in ordering the return of the deposit; see above, pp. 38, 77, 78, 109, 197, 199, 204—210,

768, 769, *n.* (*f*), 770, 771, 826.

(*o*) Above, pp. 724, 726, 776, 777; see also *Wood v. Scarth*, 2 K. & J. 33; *Rudd v. Lascelles*, 1900, 1 Ch. 815, 820.

(*p*) Above, p. 1121.

(*q*) *Re New Land Development Association and Gray*, 1892, 2 Ch. 138; *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 540; *Re Handman and Welcox's contract*, 1902, 1 Ch. 599.

have seen (*r*) that a purchaser insisting as plaintiff on the specific performance of the contract must accept such title as the vendor has contracted or is able to give; although if the purchaser were the defendant, he might be able to require a better title as the condition of the vendor's enforcing specific performance against him. There may be the same difference in the purchaser's position in a Vendor and Purchaser summons according as he contends that the vendor shall carry out the contract, or that he himself is not liable to perform it specifically. But he may himself take out a Vendor and Purchaser summons to establish the latter contention (*s*).

If the controversy be whether the contract has been discharged or not (*t*), it appears that, in general, this cannot be determined on a Vendor and Purchaser summons; for such a contention puts in issue the very existence of the contract, and the question would, in general, be one of controverted fact (*u*). It has been held, however, that the Court has jurisdiction so to determine the question, whether a power contained in the contract for either party to rescind it (such as the common power for the vendor to rescind on an unwelcome requisition (*x*)), has been well exercised (*y*). This was so decided on the ground that the Vendor and Purchaser Act only excluded the consideration of questions of the *initial* existence or validity of the contract, and did not prohibit the Court from pronouncing on the true construction of a power to rescind, which was

Questions of the discharge of the contract.

Discharge by exercise of an express power of rescission.

(*r*) Above, pp. 88, 1118, 1119.

(*s*) *Re Davis and Carey*, 40 Ch. D. 601; *Re Scott and Alvarez's contract*, 1895, 1 Ch. 596; *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 540; *Re Handman and Wilcox's contract*, 1902, 1 Ch. 599; above, pp. 205—208, 678, n. (*s*).

(*t*) Above, p. 1079.

(*u*) See *Re Poppel and Barratt*, 25 W. R. 248.

(*v*) Above, pp. 182—188, 1015, 1016.

(*y*) This point is established by numerous decisions besides that cited in the next note: see cases cited above, pp. 182—188.

Discharge for impossibility of performance.

an express term of the agreement itself (*z*). The construction of any clause contained in the contract may certainly be determined in a Vendor and Purchaser summons (*a*); but it is submitted that the excluded questions are not only those relating to the *initial* validity or existence of the contract. And it is thought that if either party contend that the contract has been discharged by mutual assent (*b*), otherwise than under an express power of rescission, and the other party dispute this, the controversy could only be determined by the Court in an action. As to discharge for impossibility of performance (*c*), it appears that the Court might in a Vendor and Purchaser summons determine whether, upon the true construction of the contract, the sale were made subject to such a condition as would, in case of the impossibility of its fulfilment, cause the parties to be discharged from their agreement (*d*). But if this were decided in the affirmative, it is thought that the question, whether the parties were in fact so discharged, could only be tried in an action. It is also submitted that an action is the proper proceeding for the trial of disputed questions of fact, as to whether the contract has been discharged by bankruptcy (*e*) or by performance (*f*), or whether the right of action arising from a breach of the contract has been discharged by any means (*g*), or barred by any Statute of Limitations (*h*).

Order for rescission of the contract and consequential relief.

It has been decided that on a Vendor and Purchaser summons the Court may not only answer any question properly submitted to it, but may also direct such things to be done as would be the natural consequence

(*z*) *Re Jackson and Woodburn's contract*, 37 Ch. D. 41.

(*a*) Above, p. 1122.

(*b*) Above, pp. 1008 *sq.*

(*c*) Above, pp. 1018 *sq.*

(*d*) Above, p. 1019.

(*e*) Above, p. 1022.

(*f*) Above, p. 1023.

(*g*) Above, pp. 1042, 1043.

(*h*) Above, p. 1045.

of the Court's decision. If, therefore, a purchaser of land take out a summons claiming that his requisitions have not been sufficiently answered and that a good title has not been shown, and the Court uphold his contention (so that he would be entitled to rescind the contract, or to claim damages for its breach (*i*)), the Court has jurisdiction in the summons to make an order rescinding the contract and to order the vendor to return the deposit with interest, and to pay the purchaser's costs of investigating the title (*k*). And it has been further held that, if a vendor take out a summons, claiming that he has shown a good title, and the Court decide that he has not, the purchaser may in the same proceeding obtain an order for the rescission of the contract, repayment of the deposit with interest, and payment of his costs of investigating title (*l*). But it is considered that this jurisdiction does not go beyond authorising an order for payment to the purchaser of such expenses as he could recover at law either in the event of his rescinding the contract (*m*) or as damages according to the rule in *Flureau v. Thornhill* (*n*); and that if the purchaser claim substantial damages, as for a wilful breach of the vendor's duty to convey the land (*o*), he must assert his rights by action (*p*). It is a question whether the Court has jurisdiction on a Vendor and Purchaser summons, where an order is made at the purchaser's instance for the rescission of the contract, to make a further order establishing the pur-

Whether an order can be made giving effect to the purchaser's lien.

(i) Above, pp. 1038, 1050.

(k) *Re Higgins and Hitchman's contract*, 21 Ch. D. 95; *Re Hargreaves and Thompson's contract*, 32 Ch. D. 454; *Re Bryant and Barningham's contract*, 44 Ch. D. 218, 222; *Re Marshall and Salt's contract*, 1900, 2 Ch. 202, 206; *Re Hare and O'More's contract*, 1901, 1 Ch. 93, 96.

(l) *Re Higgins and Percival*, 59

L. T. 213; *Re Walker and Oakshott's contract*, 1901, 2 Ch. 383.

(m) Above, pp. 1052—1054.

(n) 2 W. Black. 1078; above, p. 1063.

(o) See above, pp. 1066, 1067, 1072.

(p) *Re Hargreaves and Thompson's contract*, 32 Ch. D. 454, 457, 459; *Re Wilsons and Stevens' contract*, 1894, 3 Ch. 546.

chaser's lien for the deposit and interest and his expenses of investigating title (*q*). It is laid down in the judgments of Pearson, J., in *Re Yeilding and Westbrook* (*r*) and Chitty, J., in *Re New Land Development Association and Gray* (*s*), that the purchaser is entitled to such an order; but in the former case the order was not in fact made (*t*), and in the latter the order made was affirmed on different grounds and the point was not dealt with in the Court of Appeal. An order charging the vendor's interest was made in the Irish case of *Re Priestley and Davidson* (*u*); but in England it has not been the general practice for purchasers to claim or for the Court to make such an order (*x*); and it does not appear that this question has ever been discussed in the Court of Appeal. An order of this kind was, however, made by Kekewich, J., in *Re Furneaux and Aird's contract* (*y*). It may be remarked that the purchaser's right to a lien in case of his rescission of the contract is clearly established (*z*); and it seems to be just as much a necessary consequence of the rescission (*a*) as his right to recover the deposit, with interest, and his costs of investigating title from the vendor personally. The point, therefore, seems to fall within the principle on which the jurisdiction was established to make an order on summons against the vendor personally for payment of these items (*b*).

Position of
the parties as
to repayment
of the deposit.

We have already pointed out (*c*) the curious consequences arising from the fact that whilst the applicant and respondent in a Vendor and Purchaser summons are in the position of parties to an action for specific per-

(*q*) Above, p. 1053.

(*r*) 31 Ch. D. 344, 345.

(*s*) 1892, 2 Ch. 138, 146.

(*t*) Seton on Judgments, 2269, 6th ed.

(*u*) 31 L. R. Ir. 122.

(*x*) See cases cited above,

p. 1127, n. (*k*); Seton on Decrees, 2266, 2267.

(*y*) 1906, W. N. 215.

(*z*) Above, p. 1053.

(*a*) See above, p. 1127.

(*b*) Above, p. 1127.

(*c*) Above, pp. 39, 204 *sq.*

formance as regards the determination of the particular question raised (*d*), they are in the position of parties to an action at law with respect to any consequential order for the repayment of the deposit.

It has been held that when a party to the contract has obtained in a Vendor and Purchaser summons an order in his favour, and the other party makes default in compliance therewith, the proper course for the former to take is to apply to the Court for the enforcement of the order, and not to bring an action for specific performance of the contract or for damages (*e*). Of course, any *order* made in a Vendor and Purchaser summons, that either party shall do some act or pay some money, may be enforced by appropriate process of execution (*f*). We may observe, however, that although the Court may make a declaration on such a summons that the vendor has sufficiently answered the purchaser's requisitions, and can make a good title to the property sold, it does not appear that the Court has ever made an order in these proceedings that the contract shall be specifically performed (*g*). And in default of any such order it is difficult to see what process of execution could issue to coerce a party who acted in disregard, not exactly of a declaration made against him, but merely of the logical effect of such a declaration. In one celebrated case, in which the Court of Appeal had made such a declaration on a Vendor and Purchaser summons,

Course to be taken on non-compliance with an order made in a V. & P. summons.

Where a declaration only is made.

d. Above, p. 1122.

e. *Thompson v. Ringer*, 29 W. R. 520, 1881, W. N. 48.

f. R. S. C. 1883, Ord. XLII. rr. 3, 7, 24; Seton on Judgments, 421 *sq.*, 6th ed.

g. See Seton on Judgments, 2264 *sq.*, 6th ed.; and see above, p. 1127. And see the observations of Kekewich, J., in *Re Wallis and Bernard's contract*, 1899, 2 Ch.

515, 519—521, on the propriety of determining in a V. & P. summons the general question whether a good title has or has not been shown. The practice of so doing has, however, the sanction of the Court of Appeal: *Re Burroughs, Lynn and Seddon*, 5 Ch. D. 601; *Re Hargreaves and Thompson's contract*, 32 Ch. D. 454.

and the purchaser declined, on the ground of objections subsequently discovered, to complete the contract, the vendor brought an action for specific performance of the contract; and it does not appear that the propriety of this course was questioned (*h*). In that case the purchaser counter-claimed, by leave of the Court, to review the previous decision in the matter, on the ground that it was obtained in ignorance of material facts, which were then unknown to him and which he had subsequently discovered, but could not, with reasonable diligence, have discovered any earlier; and in the event he was enabled to avoid specific performance of the contract. If, however, the purchaser had had no such ground of defence it does not appear that the vendor could have taken any other proceedings than an action for specific performance, in order to enforce compliance with the logical result of the declaration that he had shown a good title.

Contract to
grant a lease.

An application by way of Vendor and Purchaser summons may be made in case of a contract to grant a lease of land (*i*), as well as of a sale of leaseholds (*k*).

Voluntary
gift.

But such proceedings are not applicable to a voluntary gift of or a gratuitous promise to convey land. They may, however, be taken in the case of a contract for a nominal consideration (*l*).

Form of
application.

Applications under the Vendor and Purchaser Act, 1874 (*m*), are made by summons intituled in the matter of the agreement and in the matter of the Act. The title of the summons should state shortly the date of the contract, the parties thereto, and the particulars of

h *Re Scott and Alvarez's contract*, 1895, 1 Ch. 596, 610, 1895, 2 Ch. 603; above, pp. 206, 207.
i *Re Lander and Bagley's contract*, 1892, 3 Ch. 41.

k See above, p. 97, n. (*m*).
l *Re Marquis of Salisbury*, 23 W. R. 824.
m Above, pp. 1121, 1122.

the property comprised therein (*n*). The summons may, if the judge thinks fit, be adjourned from chambers into Court and *vice versâ* (*o*). Except in simple cases, such summonses usually are adjourned into Court.

Appeals from any order made in a Vendor and Purchaser summons must, except by special leave of the Court of Appeal, be brought within fourteen days. This period is to be calculated, in the case of an appeal from an order made in chambers, from the time when the order was pronounced or when the appellant first had notice thereof, and in all other cases from the time at which the order is signed, entered, or otherwise perfected; or, in the case of the refusal of an application, from the date of such refusal (*p*). Fourteen days' notice of appeal must be given (*q*). It is thought that orders so made are in general final and not interlocutory orders; so that, under the Judicature Act, 1894 (*r*), leave to appeal therefrom is not necessary. Such orders certainly appear to dispose finally of the rights of the parties (which is the characteristic quality of a final order (*s*)) in every case where a general declaration is made in favour of or against the title (*t*), or where an order for the rescission of the contract is made (*u*), or where the logical result of the judgment given in the summons is to settle the question whether an action for specific performance or damages could be successfully maintained. As we have seen, a judgment of this kind appears to debar the parties from raising

Appeals from orders on V. & P. summons.

n. Seton on Judgments, 2269, 6th ed.; Daniell's Chancery Forms, 1201, 5th ed.

o. R. S. C. Ord. LIV. r. 9.

p. R. S. C. Ord. LVIII. rr. 9, 15; *Re Blyth and Young*, 13 Ch. D. 416; *Re Ricketts and Arent's contract*, 1890, W. N. 16; *Re Walker and Oakshott's contract*, 1902, W. N. 147.

q. R. S. C. Ord. LVIII. r. 3.
r. Stat. 57 & 58 Vict. c. 16, s. 1.

s. *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335, 345; *Bosson v. Altrincham Urban Council*, 1903, 1 K. B. 547, 548.

t. Above, pp. 1122, 1129 and *n.* *q.*

u. Above, p. 1126.

any question thereby determined in a subsequent action on the contract (*x*).

§ 5. *-Of the Purchaser's Remedies for Disturbance after Completion.*

Purchaser's remedies in case of the discovery after completion of a defect of title.

If after completion of the contract the purchaser discover that he has obtained a defective title to the land sold, so that he is liable to be ejected therefrom or disturbed in his enjoyment thereof by some stranger to the contract of sale, we have seen (*y*) that his only remedies are, (1) to bring an action of deceit or for rescission of the contract, if the vendor have been guilty of *fraudulent* misrepresentation (*z*); (2) to sue for compensation if the contract contained an express agreement for compensation so worded as to be applicable to the case (*a*); (3) to sue for damages if the vendor have given an express warranty of his ownership of or right to sell the land (*b*); (4) to sue for rescission of the contract and the return of the purchase money, if the agreement of sale were entered into under a mistake, common to both parties, as to some fact which was a condition precedent to their contracting (*c*); (5) to sue upon the vendor's covenants for title (if any) contained in the conveyance (*d*); and (6) to sue upon any other covenants for title of which the benefit runs with the land sold, and has so devolved upon the purchaser (*e*).

x, Above, p. 1129. And note that, even where an action for specific performance may be necessary to give effect to a declaration made in a V. & P. summons, the question already determined in the summons cannot be reopened except on a counter-claim by way of an action for review; above, p. 1130.

(*y*) Above, pp. 611, 653, 654, 815, 1034, 1035, 1051.

(*z*) Above, pp. 611, 653, 654, 805 *sq.*

(*a*) Above, pp. 611, 729—732.

(*b*) Above, pp. 611, 653, 654, 811, 815, 819.

(*c*) Above, pp. 778—780.

(*d*) Above, pp. 652 *sq.*

(*e*) Above, pp. 659—661.

Of these remedies, the first three have been already sufficiently examined (*f*). But the reader may be reminded that the common form of express agreement to make compensation for errors of description is not applicable where the whole property described in the conveyance has been assured by the conveyance, but the purchaser has been subsequently ejected from a part of it owing to a defect in the vendor's title (*g*). And an express agreement in the contract of sale to make compensation for any defect in the vendor's title would be a very unusual stipulation; it would also be an express warranty of the vendor's ownership. Still, such stipulations may possibly be made. The fourth remedy above mentioned has also been considered in the chapter on Mistake (*h*). But we may add here that it appears that, if the parties to a sale of land had agreed thereto on the express understanding that the vendor was full owner of the land sold (the vendor believing this to be true), so that the fact of the vendor's ownership was a condition precedent to their uniting in the formation of the contract, and it were found out after completion that the vendor and purchaser were both mistaken in this assumption, the vendor's title being wholly or partially defective, then the purchaser would be entitled to rescind the contract and recover the price paid (*i*). Thus, in *Cripps v. Reade* (*i*), a vendor of leaseholds had acquired the term by succession from a person, whom he believed to be the lawful administrator of a former owner. The vendor told the purchaser that the premises were his right and property to do what he liked with, and if anything happened he would see the purchaser righted. Whereupon the purchaser paid the price and took possession, the lease being handed over

Where the contract was made under a common mistake as to the vendor's title.

Cripps v. Reade.

f See notes *z, a, b*, above, 1901, 2 Ch. 98; above, p. 729.
 p. 1132.
(g) *Debenham v. Sawbridge*,
(h) Above, pp. 778—780.
(i) 6 T. R. 606.

to him, but no conveyance executed. It turned out that the administrator through whom the plaintiff claimed was not a lawful administrator. A rightful administrator was appointed, and recovered the premises by ejectment. The purchaser then sued the vendor to recover the price as money had and received to the purchaser's use. It was contended that the only action (if any) that could be maintained was upon the special warranty of the vendor's ownership (*k*). But it was considered that the parties had contracted on the express assumption that the vendor was the rightful owner of the term; and it was held that, as this was a mistake, the money had been paid under a mistake of fact and was recoverable accordingly (*l*). No doubt in this case no conveyance had been executed; but we have seen that where the contract has been entered into under a common mistake of fact, it may be rescinded after completion (*m*). It should be observed that contracts for the sale of land made in the ordinary form, where the purchaser trusts for his security to his own investigation of the title shown, are not entered into upon the express condition that the vendor is the owner of the whole estate sold; and no such condition is implied therein (*n*).

Remedy on
covenants for
title.

Let us now turn our attention to the purchaser's remedies on covenants for title. We have seen (*o*) that

(*k*) No doubt in this case there was an express warranty of the vendor's ownership, and this would have enabled the purchaser to recover the price, as damages, although he had taken a conveyance of the land sold; above, p. 1132, n. (*b*). But the action brought was not in form an action on such warranty.

(*l*) Above, p. 839, n. (*x*). And that a mistake or representation

as to a matter of private right (as that A. is the owner of Blackacre) is a mistake or representation of fact, see above, pp. 780, 819.

(*m*) Above, p. 778.

(*n*) See *Bree v. Holbeck*, 2 Doug. 654; and other cases cited above, pp. 654, n. (*q*), 815, n. (*q*), 1034, n. (*q*) : *Clare v. Lamb*, L. R. 10 C. P. 334.

(*o*) Above, pp. 1034, 1051.

these may be either against the vendor himself on the covenants for title contained or implied by statute (*p*) in the conveyance, or against some predecessor in title of the vendor's on covenants, which were given by him and of which the benefit has devolved on the purchaser along with the land conveyed to him. In either case the covenants may have been in common or the statutory form, or they may have been made in special terms conferring a larger or a more restricted guarantee of indemnity than is usually given (*q*). The effect of covenants of the latter kind, of course, depends on the particular terms in which they are expressed (*r*). Covenants for title in common or statutory form (that is to say, the usual covenants for right to convey, quiet enjoyment, freedom from incumbrances, and further assurance, or that a lease is valid (*s*)), are either absolute or qualified; absolute covenants for title being given upon a mortgage (*t*), but not usually on any other occasion, and qualified covenants being generally entered into upon a sale, and being then so restricted as to avail only against a defect of title arising from the acts, omissions, or

(*p*) Above, pp. 652, 657, 662.

(*q*) See above, pp. 652 *sq.*, 657, 665; Davidson, *Prec. Conv.*, vol. 2, pt. 1, pp. 379 & n., 381, 4th ed.

(*r*) Thus covenants against the acts of all persons claiming or *pretending to claim* any right are broken by a wrongful eviction; *Chaplain v. Southgate*, 10 Mod. 384; Sug. V. & P. 600. Covenants limited to *lawful* disturbance by specified persons are broken by entry under a claim, though unfounded, of right, but not by wrongful acts not done under any assertion of title; *Lloyd v. Tomkies*, 1 T. R. 671; Sug. V. & P. 600. Covenants against a man's *defaults* give a wider remedy than those concerning

only his acts, omissions and sufferances; Sug. V. & P. 602, 603; 2 Dart, V. & P. 785, 5th ed.; 885, 6th ed.; 793, 794, 7th ed. And see Sug. V. & P. 599—604, 610—615; 2 Dart, V. & P. 783 *sq.*, 5th ed.; 883 *sq.*, 6th ed.; 791 *sq.*, 7th ed. As to questions, to what extent covenants for title, not made in common form, are limited by restrictive expressions used therein, see Sug. V. & P. 605 *sq.*; 2 Dart, V. & P. 789, 5th ed.; 889, 6th ed.; 798, 7th ed.

(*s*) Above, pp. 652, 658.

(*t*) Davidson, *Prec. Conv.*, vol. 1, p. 121, 4th ed., 97, 5th ed.; vol. 2, pt. 2, p. 110, 4th ed.; Wms. Real Prop. 608, 21st ed.; above, p. 658, n. (*q*).

sufferances of the vendor himself and any of his predecessors in title subsequent to the last previous conveyance of the land for valuable consideration other than marriage (*u*). As a rule, the purchaser's only remedy against his own vendor is on the usual vendor's qualified covenants for title; and his remedy against any previous vendor will generally be of the same kind. Covenants for title running with the land may, however, include some previous mortgagor's absolute covenants for title; this will be so when the land has been sold under the mortgagee's power of sale or foreclosed (*x*). But we have seen (*y*) that when lands are sold by a mortgagor and conveyed with the concurrence of the mortgagee, the vendor's qualified covenants for title then usually given by the mortgagor to the purchaser appear to supersede and to deprive him of the benefit of the absolute covenants contained in the mortgage deed.

Absolute covenants for title avail only against rightful claims.

Absolute covenants for title are not restricted in terms so as to avail only against the acts, &c. of any particular persons (*z*); they are applicable in case of any defect of title arising from any adverse estate, interest or claim outstanding in any person or persons whomsoever. They are, however, limited by judicial construction to *lawful* eviction or disturbance by any

(*u*) This is the qualification of the statutory covenants implied by conveying as beneficial owner upon a sale. Vendor's express covenants for title in the old common form were limited to the acts, &c. of the vendor himself and his predecessors in title subsequent to the last previous sale or other conveyance for value whereon proper covenants for title were given; above, pp. 652, 657, 662. For the common and the statutory forms of covenants

for title entered into upon a sale, see Davidson, *Prec. Conv.*, vol. 2, pt. 1, pp. 232, 237, 4th ed.; stat. 44 & 45 Vict. c. 41, s. 7 (1 A., B.); *Wms. Real Prop.* 614, 622, 21st ed.

(*x*) Davidson, *Prec. Conv.*, vol. 1, p. 121, 4th ed.; vol. 2, pt. 2, p. 110, 4th ed.

(*y*) Above, p. 655.

(*z*) Davidson, *Prec. Conv.*, vol. 2, pt. 2, pp. 110, 314, 4th ed.; stat. 44 & 45 Vict. c. 41, s. 7 (1 C.).

person; that is to say, they only guarantee indemnity against adverse claims which are rightful (*a*). If a purchaser be wrongfully ejected from or disturbed in his enjoyment of the land sold after completion of the sale, he must pursue the proper legal remedies against the wrongdoer, and cannot successfully seek indemnity under any absolute covenants for title in common form, of which he is entitled to the benefit. But the usual qualified covenants for title have a different effect; they apply in terms to all acts, &c. of the particular persons specified therein. If, therefore, any of these persons wrongfully evict or disturb the purchaser, the latter may take action under the covenants for quiet enjoyment undisturbed by the wrongdoer's acts, incumbrances or claims (*b*).

Qualified covenants against all acts, lawful or unlawful, of the persons specified.

One most important consequence of the regular limitation of a vendor's covenants for title (*c*) is that, if the purchaser be ejected or disturbed, after the land has been conveyed to him, by some person rightfully claiming by title paramount to that of the vendor and of those against whose acts, &c. the vendor has covenanted, the purchaser has no cause of action upon the covenants (*d*). Nor has he in such case any right or equity to recover the purchase money, if fully paid (*e*), or to resist payment of any part thereof which may remain due to the vendor (*f*). But, of course, absolute

Purchaser's eviction by title paramount.

(*a*) *Dudley v. Folliott*, 3 T. R. 584; Sug. V. & P. 600.

(*b*) *Foster v. Mapes*, Cro. Eliz. 212, 213; *Nash v. Palmer*, 5 M. & S. 374; *Fowler v. Welsh*, 1 B. & C. 29; Sug. V. & P. 600.

(*c*) Above, pp. 652, 657.

(*d*) Above, p. 647; and see *Thackeray v. Wood*, 5 B. & S. 325, 6 B. & S. 766.

(*e*) *Maynard's case*, 2 Freem. 1, 3 Swanst. 651; *Thomas v. Powell*, 2 Cox, 394; *Urmston v. Pate*, 4

Cruise Dig. 390, cited *Wakeman v. Rutland*, 3 Ves. 233, 235; *Tylee v. Webb*, 14 Beav. 14, 17; and see cases cited above, p. 1134, n. (*n*).

(*f*) Above, p. 1034. Here it may be noted that if, before the conveyance has been fully executed, either the vendor or the purchaser, having been let into possession, be ejected by any one claiming under a title paramount to the vendor's, the purchaser

covenants for title extend to the case of any lawful (*g*) eviction by title paramount to the vendor's.

Covenant for right to convey, when broken.

The usual covenant for right to convey is broken if by reason of any act, omission or sufferance on the part of any person, whose acts, &c. are covenanted against, the conveying party or parties had not, at the time of the execution of the conveyance, such right as enabled him or them to make a valid assurance of the land in the manner expressed in the deed (*h*). And it appears, according to the balance of authority, that a breach of this covenant caused by the absence of the right contracted for is entire and complete at the time of the execution of the conveyance, so that the Statute of Limitations will begin to run in the covenantor's favour as from that date (*i*), notwithstanding that the cove-

can recover any purchase money already paid by him and resist payment of any part of the price that remains unpaid, notwithstanding that he had accepted the title, and that under the vendor's covenants for title he would have had no guarantee of indemnity against the ejector's rights; *Cripps v. Reade*, 6 T. R. 606 (as to which, see above, p. 1133); *Johnson v. Johnson*, 3 B. & P. 162; Sug. V. & P. 549. The reason of this is that the lawful ejectment of the vendor, or of the purchaser holding possession with the vendor's assent, before completion, makes it impossible for the vendor duly to fulfil the agreement by conveying the land *with the right to possession*. The vendor, therefore, is obliged to commit such a breach of the contract as entitles the purchaser to rescind it and to recover all sums paid on account of the price; see above, pp. 578, 609—611, 1037—1039, 1050—1052. If, however, the purchaser had agreed to buy such interest or title as the vendor

had (see above, pp. 202, 646), he would be bound to perform the contract, and could not recover any purchase money paid or resist payment of the price, although the vendor, or he himself having been let into possession, were ejected by title paramount before the contract had been completed by conveyance: *Early v. Garret*, 9 B. & C. 928; and see *Best v. Hamand*, 12 Ch. D. 1; above, p. 204. As to the purchaser's duty in such a case to perform the contract specifically, see *Kenney v. Wexham*, 6 Madd. 355; *Wilkinson v. Torkington*, 2 Y. & C. Ex. 726; Fry, Sp. Perf. §§ 914—921, 3rd ed.

(*g*) Above, p. 1136.

(*h*) *Bradshaw's case*, 9 Rep. 60b; *S. C.*, *nom. Salmon v. Bradshaw*, Cro. Jac. 304; *Kingdon v. Nottle*, 1 M. & S. 355, 365; Sug. V. & P. 610; *Spoor v. Green*, L. R. 9 Ex. 99, 109, 110, 116; *David v. Sabin*, 1893, 1 Ch. 523; *Turner v. Moon*, 1901, 2 Ch. 825.

(*i*) *Turner v. Moon*, 1901, 2 Ch. 825, adopting the judgment of

nantee be ignorant of the breach (*k*). If, however, the breach of covenant were fraudulently concealed by the covenantor, it appears that according to the present law the statute will not begin to run until the time when the fraud was or might with reasonable diligence have been discovered (*l*). In all these respects, a covenant for the validity of a lease and the ordinary trustee's or mortgagee's covenant against incumbrances (*m*) appear to stand on the same footing as the covenant for right to convey (*n*).

It is a breach of the usual vendor's qualified covenant for right to convey if the land assured remain subject to any outstanding estate, interest, mortgage, charge or claim, whether at law or in equity (*o*), to which the conveyance was not expressly made subject, and which was created or caused by any act, omission, or sufferance of any person comprehended in the covenant (*p*). This is the case if the vendor, or any of his predecessors in title specified in the covenant, had been bankrupt before the conveyance, and the estate sold remained in the trustee in the bankruptcy (*q*); or if the vendor or any such predecessor as aforesaid had created any mortgage or lease of the land sold and the same had not been completely got in or extinguished before or by the conveyance (*r*); or if the vendor sold as devisee of the entire fee simple but in truth took a life estate only

Examples of a breach of the usual vendor's qualified covenant for right to convey.

Bramwell, B., in preference to that of Kelly, C. B., in *Spoor v. Green*, L. R. 9 Ex. 99; 2 Dart, V. & P. 781, 5th ed.; 881, 6th ed.; 788, 7th ed.

(*k*) *Short v. M'Carthy*, 3 B. & A. 626; *Howell v. Young*, 5 B. & C. 259.

(*l*) *Gibbs v. Guild*, 9 Q. B. D. 59.

(*m*) Above, pp. 652, 657, 658.

(*n*) 2 Dart, V. & P. 781, 5th ed.; 881, 6th ed.; 789, 7th ed.

(*o*) See above, p. 1077. n. (*d*).

(*p*) See *Spoor v. Green*, L. R. 9 Ex. 99, 110, 116; *David v. Sabin*, 1893, 1 Ch. 523; *Turner v. Moon*, 1901, 2 Ch. 825.

(*q*) *Jenkins v. Jones*, 9 Q. B. D. 128.

(*r*) *David v. Sabin*, 1893, 1 Ch. 523.

under the will (*s*); or if the vendor or any such predecessor had previously sold and conveyed away a part of the land which he purported to assure (*t*), or had granted rights of way or any other easement over the land (*u*); or if the vendor selling as tenant in fee had previously made a settlement of the land, under which he was entitled for his own life only (*x*). The covenant is also broken if the vendor or any party concurring by his direction in the conveyance were under any legal incapacity (as infancy, coverture, &c. (*y*)) which prevented the conveyance from taking valid effect as expressed (*z*). It should be particularly observed that if the vendor or any other person whose acts, &c. are covenanted against, made a prior conveyance of any kind and the whole estate or interest then conveyed have not been got in before or by the assurance to the purchaser, the defect of title is owing to the act of the person who made the prior conveyance, notwithstanding that the outstanding estate or interest were not created by him, but were made without his knowledge by some person claiming under the prior conveyance. Thus, in *David v. Sabin* (*a*), A. granted a lease of land to B. for ninety-nine years, and B. mortgaged the land by demise. B. then surrendered the term to A. for valuable consideration, without disclosing to him the existence of the mortgage. Afterwards A. sold and conveyed the land to B. in fee, entering into the statutory covenants for title; and B. mortgaged the land to X. in fee, and then X. and B. together sold and conveyed the land to C. B.'s mortgage by demise having subsequently

David v.
Sabin.

(*s*) *Page v. Mallow Ry. Co.*, 1894, 1 Ch. 11.

(*t*) *May v. Platt*, 1900, 1 Ch. 616.

(*u*) *Turner v. Moon*, 1901, 2 Ch. 825; *Great Western Ry. Co. v. Fisher*, 1905, 1 Ch. 316.

(*x*) *Lock v. Furze*, L. R. 1 C. P. 441, 443.

(*y*) Above, pp. 869 *sq.*

(*z*) *Nash v. Aston*, T. Jones, 195; Sug. V. & P. 601.

(*a*) 1893, 1 Ch. 523.

established his charge on the land in an action against C., C. sued A. on the statutory covenants for title implied in A.'s conveyance to B. And it was held by the Court of Appeal, reversing the decision of Romer, J., that, as the granting of the lease was the act of A., he had committed a breach of his covenant for right to convey, and it was immaterial that the actual outstanding interest, viz., B.'s underlease by way of mortgage, was made by B. without A.'s knowledge. And it was further decided that the mortgage was an incumbrance made by a person claiming under A., and the establishment of the charge by action was the act of a person claiming under A.; so that A. had also committed a breach of his covenants for quiet enjoyment and freedom from incumbrances. The Court also held that, as the defect of title was referable to the act of A. in originally granting the lease, he was not exonerated from liability under the covenants by the fact that he took back the surrendered term as a purchaser for valuable consideration. For the mortgage sub-term remained unaffected by the surrender; and A. did not then purchase the mortgagee's interest, or obtain any title thereto. Finally, it was considered that B.'s fraud in concealing his mortgage from A. could not be pleaded as a defence to C.'s action on the covenants (b).

As judicial decisions upon the construction of covenants for title are not of very common occurrence, a further illustration may be given. The facts are taken, with some alteration, from a case on which the writer was instructed to advise. A. sold land to B. The land was subject, together with other lands of large value, to a mortgage in fee created by a person, under whom A. claimed by settlement, and the title to the mortgage

(b) As to this point, see below, p. 1160.

was satisfactorily deduced to C. The purchase was completed, C. receiving the whole purchase money by A.'s direction, and the land being conveyed by C. as mortgagee and by A. as beneficial owner to B. in fee simple. Afterwards B. was informed by C.'s solicitors that, *owing to the appointment of a new trustee*, the mortgage had been transferred, subsequently to the settlement of the draft conveyance, to C. and D.; and that this circumstance had been overlooked in executing the conveyance. It was obvious that C. had committed a breach of the statutory covenant against incumbrances; but it further appeared, according to the rule in *David v. Sabin* (c), that A. had committed a breach of his covenant for right to convey. For one half of the mortgagee's legal estate remained outstanding in D., and the mortgage having been created by a person, against whose acts A. had covenanted, it appeared that A. was liable under the covenant, notwithstanding that he was entirely innocent of the immediate cause of the defect of title, that is to say, of C.'s conveyance of the mortgage estate to himself jointly with D. We may also remark that, owing to the form in which the information was conveyed to B., it appeared that he was affected with notice that C. was a trustee—a fact which had of course been carefully kept off the abstract (d). D. was willing to confirm the sale, but as B. found that he had paid the purchase money to one of two trustees, who had no power (unless specially authorised) to give a good discharge therefor, he was obliged to make requisitions for the production of the title of the beneficial owners of the mortgage money, in order to satisfy himself that the mortgage was an authorised investment of the trust money, and that C. and D. were duly

c. Above, p. 1140.

(d) Above, p. 238, n. (b).

appointed trustees, who could give him a good discharge for his payment (e).

The usual vendor's qualified covenants for quiet enjoyment and freedom from incumbrances are for quiet enjoyment, undisturbed by and free from all estates, incumbrances, and claims created or caused by any person or persons whose acts are covenanted against (f), or *any person claiming under or in trust for him or them* (g). And it is important to mark that the regular covenant for freedom from incumbrances is, *not* that the lands conveyed *are* free from incumbrances, but that they shall be quietly enjoyed free from the incumbrances specified (h). It follows that if land be conveyed which is subject to some outstanding incumbrance not expressly mentioned in the conveyance but comprehended in the covenants for title (as in *David v. Sabin* (i)), no breach of the vendor's covenant against incumbrances is committed by the mere fact of conveyance. It is not until the purchaser is disturbed in his quiet enjoyment of the premises by reason of the incumbrance that a breach of that covenant arises (k). As the covenants for quiet enjoyment and freedom from incumbrances are not broken until the quiet enjoyment promised is disturbed, the Statute of Limitations does not begin to run against the covenantee until that event has happened, and then runs only in respect of the particular breach so occasioned (l). It appears that any outstanding estate, charge, or claim which would

Nature of the usual qualified covenants for quiet enjoyment and freedom from incumbrances.

Breach thereof, when committed.

(e) Above, pp. 240, 241.

(f) Above, pp. 1135, 1136 and n. (n).

(g) Davidson, *Prec. Conv.*, vol. 2, pt. 1, p. 232, 4th ed.; stat. 44 & 45 Vict. c. 41, s. 7 1 A; *David v. Sabin*, 1893, 1 Ch. 523, 532; above, p. 1141.

(h) Sug. V. & P. 610; *Nottidge v. Dering*, 1909, 2 Ch. 647, 656.

affirmed, 1910, 1 Ch. 297.

(i) Above, p. 1140.

(k) *Van v. Bennett*, 1811, 1 Eq. 6, 7; Sug. V. & P. 610; *Nottidge v. Dering*, 1909, 2 Ch. 647, 656, affirmed, 1910, 1 Ch. 297.

(l) 2 Dart. V. & P. 781, 7th ed.; 881, 6th ed.; 788, 7th ed.

(m) Above, p. 1139.

amount to a breach of the vendor's usual qualified covenant for right to convey (*m*) will be sufficient, so soon as the purchaser is disturbed by virtue thereof in his quiet enjoyment of the land sold, to cause a breach of the usual covenant against incumbrances. And of course in such case the disturbance of the purchaser's quiet enjoyment will in itself be a breach of the covenant for quiet enjoyment, apart from the covenant against incumbrances (*n*).

Persons
claiming
under the
covenantor.

A covenant for quiet enjoyment, undisturbed by any person *claiming under* the covenantor, is broken by the entry, not only of any person who has succeeded to the whole or any part of the covenantor's estate, whether after his death or by conveyance *inter vivos*, but also of any person who but for the covenantor's act would have had no title to the land (*o*). Thus a disturbance by the covenantor's heir or devisee, by his widow entitled to dower (*p*), or her husband to curtesy, or by any one claiming under a prior conveyance by the covenantor on sale, mortgage, or settlement (*q*), would be a breach of the covenant; and so would an entry by a person deriving title under a prior appointment by the covenantor under any power given to him either alone or jointly with any other person (*r*). And where a term of years had been created and mortgaged with the covenantor's concurrence under a power exercisable by trustees with his consent, the mortgagee was held to be a person claiming under the covenantor (*s*). Where a lessee was disturbed by a distress for arrears of land tax accrued due before the lease was made, it was con-

(*n*) See above, p. 1141.

(*o*) *Hurd v. Fletcher*, Doug. 43 ;
Evans v. Vaughan, 4 B. & C. 261,
267 ; *Carpenter v. Parker*, 3 C. B.
N. S. 206 ; *Calvert v. Sebright*, 15
Beav. 156, 160.

(*p*) *Anon.*, Godbolt, 333.

(*q*) *Evans v. Vaughan*, 4 B. & C.
261.

(*r*) *Hurd v. Fletcher*, Doug. 43 ;
Calvert v. Sebright, 15 Beav. 156.

(*s*) *Carpenter v. Parker*, 3 C. B.
N. S. 206.

sidered that this was a disturbance by a person claiming against and not under the lessor, and was no breach of the lessor's express covenant for quiet enjoyment, undisturbed by the lessor himself or any one claiming under him (*t*). But if a vendor give the statutory covenants for freedom from incumbrances made, occasioned, or *suffered* by himself, he will be liable thereunder in case the property sold remain subject, after the conveyance to the purchaser, to any charge thereon which the vendor was bound, but has omitted, to clear off before completion of the sale (*u*).

Although the usual qualified covenant for quiet enjoyment will be broken by any disturbance, lawful or unlawful, on the part of some person whose acts are particularly covenanted against (*x*), a disturbance by any one *claiming under* such person will not cause any breach unless it be done under a claim of right derived from such person. The covenantor is not answerable for the purely wrongful acts of those claiming under the persons against whose acts, &c. he has promised to indemnify the covenantee (*y*).

Disturbance by one claiming under a person, whose acts are covenanted against.

In order to establish a breach of a covenant for quiet enjoyment, or for quiet enjoyment free from incumbrances, it is necessary to prove that the plaintiff has been actually disturbed in his possession or enjoyment of the premises, as by his ejection therefrom, or by entry thereon or user thereof contrary to his right (*z*), or by blocking up a private way

What is a breach of a covenant for quiet enjoyment.

(*t*) *Stanley v. Hayes*, 3 Q. B. 105; Sug. V. & P. 603; 2 Dart. V. & P. 884.

(*u*) *Stock v. Meakin*, 1900, 1 Ch. 683, 694; above, pp. 521, 522.

(*x*) Above, p. 1137.

(*y*) *Sanderson v. Mayor of Berwick-on-Tweed*, 13 Q. B. D. 547;

Harrison v. Manchester, 1891, 2 Q. B. 680, 683, 685; *Williams v. Gabriel*, 1906, 1 K. B. 155.

(*z*) *Shepp. Touch*, 170; *Howard v. Maitland*, 11 Q. B. D. 695; and see *Carpenter v. Parker*, 3 C. B. N. S. 206.

which gives access thereto (*a*), or by notice to his tenants to pay rent to an adverse claimant (*b*). And the disturbance complained of must have been either the direct act of some person comprehended in the covenant or else a consequence, which he foresaw or ought reasonably to have foreseen, of some act of his (*c*). If an adverse claimant take proceedings against the purchaser at law or in equity to establish his right, that appears to be a disturbance of the purchaser's quiet enjoyment (*d*). But where, after completion of a sale of land, a decree was made by the Court of Chancery establishing a right of common thereover, and the purchaser was no *party* to the suit, though he was one of a class of persons who were represented therein, it was considered that this alone was no breach of the vendor's covenant for quiet enjoyment: but it was admitted that the decision would have been different if the decree had been made against the purchaser personally (*e*). A simple assertion of an adverse claim, though reiterated to an extent which may cause mental annoyance, and mere threats of legal proceedings, however disturbing to the threatened party's peace of mind, do not appear to be any breach of a covenant for his quiet enjoyment of some land assured to him (*f*).

Whether acts
not affecting
the title or
possession
can be a

It is a question, upon which conflicting opinions have been judicially expressed, whether a covenant for quiet enjoyment can be broken by any act which does

(*a*) *Andrews v. Paradise*, 8 Mod. 318; *Morris v. Edgington*, 3 Taunt. 24.

(*b*) *Edge v. Boileau*, 16 Q. B. D. 117.

(*c*) *Harrison v. Manchester*, 1891, 2 Q. B. 680; *Williams v. Gubiel*, 1906, 1 K. B. 155; see also *Markham v. Paget*, 1908, 1 Ch. 697.

(*d*) See *Hunt v. Danvers*, T.

Raym. 370; *Howard v. Maitland*, 11 Q. B. D. 695, 700; *David v. Sabin*, above, p. 1140.

(*e*) *Howard v. Maitland*, *ubi sup.*

(*f*) See *Witchcot v. Nine*, 1 Brownlow & Goldsborough, 81; *Carpenter v. Parker*, 3 C. B. N. S. 206; *Howard v. Maitland*, 11 Q. B. D. 695, 703; *Edge v. Boileau*, 16 Q. B. D. 117, 120.

not affect the title to the land or directly infringe upon the covenantee's possession (*g*). But it is established that a covenant for quiet enjoyment does not enlarge the grant in any way; so that if one sell and convey land, giving the usual covenants for title, and afterwards acquire some adjoining land, he is not liable to be restricted in his lawful user of the after-acquired land by the fact that such user may cause inconvenience to his grantee (*h*). Thus he may well build thereon so as to obstruct the access of light to his grantee's windows, if the grantee had not previously acquired any easement of light (*i*). So, also, he may build thereon a tall chimney or a high wall, notwithstanding that the effect of this is to cause his grantee's chimneys to smoke (*k*). And in neither case will he commit any breach of his covenant for quiet enjoyment (*k*). And the better opinion appears to be that, even where the vendor is possessed, at the time of conveyance, of land adjoining the land sold, no breach of his covenant for quiet enjoyment is committed by any act done on the adjoining land, which does not affect the title to the land sold or any easement conveyed therewith (*l*), or directly infringe upon the purchaser's possession (*m*), or derogate

breach of a covenant for quiet enjoyment.

(*g*) See *Morgan v. Hunt*, 2 Ventr. 213; *Dennett v. Atherton*, L. R. 7 Q. B. 316, 326, 327; *Sanderson v. Mayor of Berwick-on-Tweed*, 13 Q. B. D. 547, 551; *Harvison v. Muncaster*, 1891, 2 Q. B. 680, 684, 689; *Aldin v. Latimer Clark, Muirhead & Co.*, 1894, 2 Ch. 437, 444; *Manchester, Sheffield and Lincoln Ry. Co. v. Anderson*, 1898, 2 Ch. 394, 401; *Tebb v. Cave*, 1900, 1 Ch. 642; *Davis v. Town Properties Investment Corpn.*, 1903, 1 Ch. 797, 801, 805; *Brown v. Flower*, 1911, 1 Ch. 219, 228.

(*h*) *Davis v. Town Properties Investment Co.*, 1903, 1 Ch. 797; *Nottidge v. Dering*, 1910, 1 Ch. 297, 307.

(*i*) *Booth v. Alcock*, L. R. 8 Ch. 663.

(*k*) See note (*h*), above.

(*l*) See above, p. 642.

(*m*) See *Sanderson v. Mayor of Berwick-on-Tweed*, 13 Q. B. D. 547, where the plaintiff held land under a lease from the defendant, who had covenanted for quiet enjoyment; and the lawful user by another lessee from the defendant of land adjoining the plaintiff's caused a flow of water into the plaintiff's land; and this was considered to be a direct interference with the plaintiff's enjoyment, and to be a breach of the covenant for quiet enjoyment. But it seems questionable whether the facts of the case justified this decision; for the defendant's lessee was entitled to drain his

Tebb v. Cave.

from the grant (*n*), but only inflicts by indirect means some inconvenience to the purchaser, not amounting to an independent cause of action (*o*). It is true that in one case, where a man possessed of a house and an adjoining plot of land leased the house, with the usual covenant for quiet enjoyment, and afterwards erected on the adjoining land buildings of such a height as to cause the chimneys of the house to smoke, it was held that he had committed a breach of his covenant for quiet enjoyment (*p*). But the correctness of this decision has been questioned in the Court of Appeal (*q*).

Covenant for further assurance.

The usual covenant for further assurance is, in effect, for the assurance at any future time to the purchaser, at his own request and cost, of any outstanding estate or interest, to which the conveyance is not made subject, which is necessary to be got in before the conveyance can take effect as intended (*r*), and which is vested in the vendor, or in any other person by, through, under or in trust for the vendor, or by, through or under any one else, against whose acts, &c. the vendor has covenanted (*s*). It is therefore a breach of this covenant if the vendor, or any other person, in whom

land through a system of drainage passing under the plaintiff's land, and the damage complained of arose because a drain pipe situate within the plaintiff's land was out of repair, and so allowed the water to escape. It is submitted that the true question to have been considered was, whether the defendant was bound to keep this pipe in repair, or had warranted it to be fit for its purpose; see above, p. 764 and n. (*l*). It appears, too, that the principle asserted in that case is open to question; see authorities cited above, p. 1147, n. (*g*); and see *Harrison v. Muncaster*, 1891, 2 Q. B. 680.

n See *Alden v. Latimer Clark, Muirhead & Co.*, 1894, 2 Ch. 437; *Grosvenor Hotel Co. v. Hamilton*, 1894, 2 Q. B. 836; *Markham v. Paget*, 1908, 1 Ch. 697.

(*o*) See *Robinson v. Kilvert*, 41 Ch. D. 88; *Harrison v. Muncaster*, 1891, 2 Q. B. 680; *Davis v. Town Properties Investment Corp., Ltd.*, 1903, 1 Ch. 797, 804, 805; *Browne v. Flower*, 1911, 1 Ch. 219, 224—228.

(*p*) *Tebb v. Cave*, 1900, 1 Ch. 642.

(*q*) See note (*h*), above, p. 1147.

(*r*) See *King v. Jones*, 5 Taunt. 418, 427; *Davis v. Tollemache*, 2 Jur. N. S. 1181, 1185; *Re Jones*, 1893, 2 Ch. 461, 471.

(*s*) See above, pp. 1135, 1136 and n. (*u*).

any such estate or interest is so vested, refuse to assure the same to the purchaser on being requested to do so. And it is to be observed that the words of the covenant, providing that the further assurance shall be made at the covenantee's cost, refer only to the expense of conveyance. If any outstanding estate or interest comprehended in the covenant should have been conveyed to the person, in whom it is vested, for valuable consideration, the covenantee is not bound to offer to buy it in or tender compensation, but the simple refusal to convey will cause the covenant to be broken (*t*). The vendor is bound under this covenant to assure to the purchaser any such estate or interest as aforesaid, vested in himself or any one in trust for him, whether it belonged to him at the date of the execution of the conveyance, or were afterwards acquired by him, even for valuable consideration (*u*). To this extent, the purchaser may oblige the vendor to perform the covenant specifically (*x*). And of course any one, who might succeed to the vendor's said estate or any part of it by act of law, gratuitous conveyance, purchase with notice of the covenant, or purchase of a merely equitable interest, would be equally liable so to carry out the vendor's agreement (*y*). But if any person, who claims or might claim under the vendor or under any one else comprehended in the vendor's covenants for title, should, subsequently to the conveyance to the purchaser, acquire by some independent title an interest in the land, it does not appear that his refusal to assure that interest would be a breach of the covenant for further assurance; the terms of which extend only to estates or interests vested in such a person by title derived from the vendor

(*t*) *Re Jones*, 1895, 2 Ch. 461, 471. 274, 2 Ch. Ca. 212; Sug. V. & P. 612.

(*u*) *Taylor v. Debar*, 1 Ch. Ca.

(*x*) Sug. V. & P. 612.

(*y*) Above, pp. 527, 528, 565.

himself, or his predecessors mentioned in the covenant. Thus if the vendor, being entitled only to the residue of a long term, had purported to sell and convey the fee, and were afterwards to acquire by descent, devise, or purchase for value, the entire freehold reversion, he would be bound under his covenant for further assurance to convey the same to the purchaser; and so would his heirs, trustee in bankruptcy, and gratuitous or equitable assignees. But if the freehold reversion were to be acquired by the vendor's eldest son under an independent title, not transmitted to him from his father, he would not then be bound to assure the same to the purchaser; nor would the vendor's covenant for further assurance be broken by his refusal to do so.

Covenant for further assurance does not enlarge the grant, unless such were the intention.

Davis v. Tollenmacher.

It appears that a covenant for further assurance, like a covenant for quiet enjoyment (*z*), will not be construed so as to enlarge the grant, unless the parties' intention appear to be that the grant shall be supplemented by the subsequent assurance of some estate or interest not purported to be comprised therein. Thus, where a tenant in tail in remainder by deed *unenrolled* had mortgaged his own estate and interest in the land and covenanted for further assurance, it was considered that he was not bound under the covenant to execute a disentailing deed (*a*). And if one sell and convey any other particular estate which he has in land, or such estate or interest as he has therein, covenanting for further assurance in the usual form, and afterwards acquire some other estate or interest therein, it appears that he will not be bound to convey this to the purchaser (*b*). On the other hand, where a tenant in tail has assumed to sell and convey the entire fee simple, he

^a Above, p. 1117.

^a *Davis v. Tollenmacher*, 2 Jur. N. S. 1181; see above, p. 532.

^b *Id.*

^b See *Smith v. Osborne*, 6 H. L. C. 375, 390—392, 395, 398.

will be bound under his covenant for further assurance to bar the entail; and his trustee in bankruptcy will be equally liable so to give effect to the covenant (*c*). And where a tenant in tail in remainder had converted his estate into a base fee, and had then sold and conveyed all his estate and interest in the land to a purchaser in fee, covenanting to execute every such *disentailing* or other assurance as might be required for more perfectly assuring the premises to the purchaser, his heirs and assigns, he was obliged to perform his covenant, when the remainder fell into possession, by executing a further disentailing assurance to the purchaser's use, so as to vest in him the entire fee simple (*d*).

Bankes v. Small.

It appears that, under a covenant for further assurance, the covenantor may be required to execute a duplicate of the conveyance, if the original have been casually destroyed (*e*) or handed over to a sub-purchaser of part of the lands sold (*f*); but in such case the assurance executed should be indorsed as a duplicate (*f*), or expressed to be merely a deed of confirmation (*g*). It seems to be a question whether, under a covenant for further assurance, a purchaser can require to be furnished with a covenant or an acknowledgment for production of title deeds (*h*); but it does not appear that he can have any larger right in this respect by virtue of such a covenant than he enjoyed under the contract of sale (*i*). And if the conveyance did not contain such an acknowledgment as the purchaser was entitled to require, it does not appear that the contract of sale

Acts which may be required under a covenant for further assurance.

(*c*) *Pye v. Daubuz*, 3 Bro. C. C. 595; *Ex parte Frepp*, De G. 295; see above, p. 532, n. (*p*).

(*d*) *Bankes v. Small*, 34 Ch. D. 415, 36 Ch. D. 716.

(*e*) *Bennett v. Ingoldsby*, Finch, 262; 2 Dart, V. & P. 888.

(*f*) *Napper v. Allington*, 1 Eq.

Ca. Abr. 166.

(*g*) 2 Dart, V. & P. 785, 5th ed.; 888, 6th ed.; 797, 7th ed.

(*h*) See *Hallett v. Middleton*, 1 Russ. 243; *Fain v. Ayers*, 2 S. & S. 533; Sug. V. & P. 613.

(*i*) Above, pp. 684 *sq.*, 1150.

has been completely discharged, so as to prevent the purchaser from suing on the particular stipulation respecting the acknowledgment (*k*); more especially as acknowledgments are frequently given by a document separate from the conveyance (*l*). It is also a question whether a person executing a conveyance pursuant to a common covenant for further assurance is bound therein to covenant for title; but the better opinion appears to be that he is not; although a trustee executing such an assurance may be required to give the usual covenant against incumbrances (*m*). The usual covenant for further assurance (which is to do such acts as may reasonably be required for the purpose) is not broken by refusal to do an unnecessary act (*n*); nor if the failure to convey on request is occasioned by the act of God, as by the death (*o*), insanity (*p*), or severe illness (*q*) of the person whose assurance is required.

Measure of damages for breach of covenant for right to convey.

For breach of the covenant for right to convey (which is, as we have seen (*r*), broken if the right be defective at the time of conveyance) the measure of damages is the difference between the value of the property as purported to be conveyed and its value as the vendor had power to convey it (*s*). And it is important to observe that the true measure of damages is the difference, not between the *price paid* and the value of the property as conveyed, but in the value of the property as purported to be and as actually conveyed; so that if the property as purported to be conveyed were worth

l. See above, pp. 1024, 1034.

l. Above, p. 693.

(m) See Sug. V. & P. 614, 615.

n *Warr v. Bickford*, 9 Price,

42
a *Nash v. Aston*, T. Jones,
195.

p. *Pit and Cally's case*, 1 Leon.
304.

(q) *Anon.*, Moore (K. B.), 124.

(r) Above, p. 1138.

(s) *Gray v. Briscoe*, Noy, 142;
Wace v. Bickerton, 3 De G. & Sm.
751; *Jenkins v. Jones*, 9 Q. B. D.
128; *Turner v. Moon*, 1901, 2 Ch.
825, 829; *Great Western Ry. Co.*
v. Fisher, 1905, 1 Ch. 316, 323.

more at the time of conveyance than the price paid for it, the purchaser would be entitled to the difference in the value at that time of what he contracted to buy and what he got (*t*). And of course by the same rule, if the price paid were in excess of the value, the purchaser would still be entitled to recover the difference in value only. But it appears that, in the absence of any other evidence as to the value of the property, as purported to be conveyed, at the time of conveyance, the price paid will be taken to be the value thereof (*u*). If, therefore, the property were sold and conveyed as free from incumbrances, and it turn out to be subject to some outstanding estate, interest or right, which is covered by the terms of the covenant for right to convey (*x*), the purchaser will be entitled to recover the amount by which the existence of the adverse interest has diminished the value of the purchased property (*y*). And where the purchaser has been obliged to pay off any outstanding mortgage or charge covered by the covenants for title, or to buy in any estate or interest so covered, in order to procure for himself the actual enjoyment of the property as purported to be conveyed, he will be entitled to recover the money so expended (*z*). Where such outstanding estate amounts to the entire rightful ownership of the property sold, so that what the vendor had power to convey was of no value at all, and the purchaser has never been in possession or was

(*t*) *Jenkins v. Jones*, 9 Q. B. D. 128. It is submitted that this case proves that the same measure of damages is applicable on breach of covenants for title entered into on a conveyance of land as on breach of a warranty of title or quality given on a sale of goods; see *Loder v. Kekub*, 3 C. B. N. S. 128; *Jones v. Just*, L. R. 3 Q. B. 197; *Re Bahia and San Francisco Ry. Co.*, ib. 584; *Re Ottos Kopje Diamond Mines, Ltd.*, 1893, 1 Ch. 618; *Balkis Consolidated Co. v.*

Tomkinson, 1893, A. C. 396.

(*u*) *Turner v. Moon*, 1901, 2 Ch. 825, 829; cf. above, p. 1067.

(*x*) Above, p. 1139.

(*y*) See *Kingdon v. Nottle*, 4 M. & S. 53, 54; *David v. Sabin*, 1893, 1 Ch. 523, 527, 537, 541, 546 (above, p. 1140); *Page v. Midland Ry. Co.*, 1894, 1 Ch. 11, 21; *May v. Platt*, 1900, 1 Ch. 616, 623; and cases cited above, n. s. p. 1152.

(*z*) *Great Western Ry. Co. v. Fisher*, 1905, 1 Ch. 316.

immediately ejected, the purchaser will be entitled to recover the whole value of the property as purported to be conveyed (*a*). If, however, the vendor had any, even a mere possessory title to the land conveyed, and the purchaser have actually had some beneficial enjoyment thereunder, it appears that the value of the interest so actually enjoyed would have to be deducted.

Breach of
covenant for
quiet enjoy-
ment.

The measure of damages for breach of a covenant for quiet enjoyment (which, as we have seen (*b*), is not broken until some actual disturbance has taken place) is what the covenantee has lost in consequence of the breach of covenant; that is to say, in case of an entire eviction, the value at the date of the breach of the property so taken away from him (*c*). And where the purchaser has not been altogether deprived of the property conveyed to him, but its value has been permanently diminished by the assertion of some outstanding estate or interest comprehended in the covenant, he is entitled to recover the difference between the value at the date of the breach of the property as contracted to be enjoyed by him and its value in the state in which it remains to him immediately after the breach (*d*). But the remedy on a covenant for quiet enjoyment is not limited to the value of the property of which the purchaser has been deprived: he may recover thereunder all damages which are the natural consequence of the breach (*e*), such as the expense (where he has been ejected) of moving into a new house or place of business (*f*). Where the breach of a covenant for quiet enjoyment is not an entire eviction, nor a permanent

(*a*) *Jenkins v. Jones*, 9 Q. B. D. 128.

(*b*) Above, p. 1143.

(*c*) *Williams v. Burrell*, 1 C. B. 402, 410, 433; *Lock v. Force*, L. R. 1 C. P. 441; *Rolph v. Crouch*, L. R. 3 Ex. 44, 49, 50;

Jenkins v. Jones, 9 Q. B. D. 128.

(*d*) See cases cited above, p. 1153, nn. (*y*, *z*).

(*e*) See above, p. 1062.

(*f*) *Grosvenor Hotel Co. v. Hamilton*, 1894, 2 Q. B. 836, 840.

alienation of some part of the covenantee's estate, but is only a temporary disturbance, as by entry under a right of way, the measure of damages is not the same as for breach of a covenant for right to convey—that is, the difference in value (*g*)—but is only the actual inconvenience suffered up to the date of the assessment of damages (*h*).

Where the purchaser has been evicted, he is entitled **Interest.** to recover interest on the assessed value of the land, from the date of eviction until payment, by way of damages for loss of profits during the time that he has been out of possession (*i*). And on the same principle he is entitled to interest on the amount of any outstanding charge or claim, which is covered by the covenants for title, and which he has paid off or bought in (*k*). It appears, however, that if the purchaser be negligent in not suing at once upon the covenants for title, he may be deprived of interest for any time that he has been kept out of the principal money by his own delay (*l*).

If the purchaser should have expended money on **Improve-** improvements subsequently to the conveyance, it has been a question how far he can recover the value of the improvements, in case of his eviction, under the covenants for title. It appears that as regards the covenant for right to convey, the damages ought to be measured by the value of the land at the time of the breach of covenant, that is, at the date of the execution of the conveyance (*m*); and this would of course exclude compensation for any subsequent improvements. But with

(*g*) Above, p. 1152.

(*h*) *Child v. Stenning*, 11 Ch. D. 82; R. S. C. Ord. XXXVI. r. 58.

(*i*) *King v. Jones*, 5 Taunt. 418, 422.

(*k*) *Great Western Ry. Co. v. Fisher*, 1905, 1 Ch. 316.

(*l*) *Anderson v. Liverpool C. Co.*, 2 Per. & Dav. 408.

(*m*) Above, pp. 1138, 1152.

respect to the covenants for quiet enjoyment and freedom from incumbrances, which are not broken until some actual disturbance has taken place (*n*), the case is different; and the better opinion appears to be that under these covenants an evicted purchaser is entitled to recover the actual value of the land, as it existed at the date of the breach of covenant. This would include the value of any buildings or similar improvements which the purchaser had erected or made. It appears to be admitted that the value of such improvements would be recoverable where by the contract of sale it was contemplated that they should be made (*o*). But it is submitted that in measuring the damages for breach of a covenant for quiet enjoyment, the true question is what was contemplated by that contract, and not by the contract of sale. And where land is conveyed on a sale to a purchaser in fee, with a covenant for quiet enjoyment, what is contemplated appears to be that he shall quietly enjoy the same as full owner and with the owner's liberty to use or improve the premises as he will. And if he be evicted for some cause, which occasions a breach of this covenant, his loss appears to be truly measured by the value at that time of the property from which he has been ejected (*p*); and these damages seem to be such as are the natural consequence of the breach, or at least such as the parties to the covenant must have contemplated as the result thereof (*q*). It is further submitted that the rule, which entitles an evicted purchaser to recover, on

(*n*) Above, p. 1143.

o *Bromy v. Hopkinson*, 27 Beav. 565.

(*p*) This rule appears to have been applied in *Lock v. Force*, L. R. 1 C. P. 441, and *Rolph v. Crouch*, L. R. 3 Ex. 44, 49, 50, where the plaintiff recovered the value of a conservatory erected by him: and it is submitted that

those decisions outweigh the authority of the *dicta* to the contrary in *Lewis v. Campbell*, 3 J. B. Moore, 35, 52, 54, 57; and see 2 Dart, V. & P. 793, 794, 5th ed.: 894, 6th ed.: 863, 7th ed., and consider *Grosvenor Hotel Co. v. Hamilton*, 1894, 2 Q. B. 836: above, pp. 1154, 1155.

(*q*) Above, p. 1062.

a breach of a covenant for quiet enjoyment, the value of the property as it existed at the date of the breach (*r*), will enable him to recover the full value of the land at that time, notwithstanding that its value should have been enhanced, since it was conveyed to him, by circumstances independent of his own outlay or efforts (*s*). Of course the same rule gives to the covenantor the benefit of any fall since the conveyance in the value of the property sold (*t*).

The purchaser may well compromise or refer to arbitration any adverse claim made upon him, which would be covered by the vendor's covenants for title, without giving notice to the vendor of the claim or his proceedings; and he will be entitled to recover under the covenants the amount paid or awarded to be paid by him as compensation and costs to the claimant, with interest thereon at 4 per cent. per annum from the date of payment, and his own solicitor's costs of the compromise or arbitration to be taxed as between solicitor and client (*u*). If however the vendor had received no notice of the claim and the intention to compromise it, he would be at liberty to prove in defence that the claim was unfounded, either wholly or partially, or that he could have made better terms than the purchaser, or that the purchaser made an improvident bargain: though in these respects he would have to bear the burthen of proof. On the other hand, if notice of the claim be given to the vendor and he decline or fail to remove or contest it himself, he will be estopped from alleging any such grounds of defence (*x*). But if an action or

Compromise
by the purchaser of
adverse
claims on the
land purchased.

(*r*) Above, p. 1154.

(*s*) It is submitted that the opinion to the contrary expressed in *Mayne on Damages*, 228, 7th ed., cannot be supported since the decisions cited above, p. 1154,

n. (*c*).

(*t*) Above, pp. 1152, 1153.

(*u*) *Great Western Ry. Co. v. Fisher*, 1905, 1 Ch. 316.

(*x*) *Smith v. Compton*, 3 B. & Ad. 407.

Action
brought
against the
purchaser.

other proceeding in Court be brought by an adverse claimant against the purchaser, he cannot safely defend it without giving notice to the vendor or other person liable on the covenants for title, and obtaining his directions as to the course to be pursued. For if the purchaser omit to do this, and there be no good nor reasonably probable (*y*) ground of defence, he will not be entitled to recover any costs of defending the proceedings against him as damages necessarily resulting from the breach of covenant (*z*). If the purchaser obtain the vendor's authority to defend the action, or if with the vendor's authority the purchaser himself institute proceedings against an adverse claimant, he will be entitled to recover his costs of the proceedings, though unsuccessful therein (*a*). And it has been held that, if the purchaser give such notice as aforesaid and his application be disregarded, he may then defend the proceedings at his own discretion and without any express authority from the covenantor; and he will be entitled to recover under the covenant his costs of the defence, namely, any costs that he may have been ordered to pay to the successful party, and his own costs taxed as between solicitor and client (*b*). But even in this case it is questionable whether he could recover any such costs, if the facts were such that any defence must be hopeless (*c*). Where an award in an arbitration or judgment in an action has been given against the purchaser, he should not defend an action

(*y*) See *Agius v. Great Western Colliery Co.*, 1899, 1 Q. B. 413, 421, 423; and above, p. 1067.

(*z*) *Short v. Kalloway*, 11 A. & E. 28, 31; *Walker v. Hatton*, 10 M. & W. 249; *Pow v. Davis*, 1 B. & S. 220; *Great Western Ry. Co. v. Fisher*, 1905, 1 Ch. 316, 323.

(*a*) *Williams v. Burrell*, 1 C. B.

402; *Child v. Stenning*, 11 Ch. D. 82.

(*b*) *Rolph v. Crouch*, L. R. 3 Ex. 44; *Great Western Ry. Co. v. Fisher*, 1905, 1 Ch. 316, 323, 324; see also *Agius v. Great Western Colliery Co.*, 1899, 1 Q. B. 413.

(*c*) See *Agius v. Great Western Colliery Co.*, 1899, 1 Q. B. 413, 421, 423.

on the award or appeal against the judgment, without the covenantor's express direction; otherwise he will be unable to recover any costs of such proceedings as damages (*d*).

It has been already explained (*e*) how the benefit, both of the statutory and of express covenants for title, runs with the land, in respect of which the covenants were given; and that the covenants may be enforced by any person taking the whole or any part of the covenantee's estate, and are apportionable accordingly. If a breach of covenants for title be committed, and the covenantee die without suing thereon, the right of action will, in so far as he has suffered any actual damage, belong to his executors or administrators (*f*): but will otherwise pass to the person who has succeeded to his estate in the land (*g*).

Covenants for title run with the land,

and are apportionable.

Covenants for title are construed literally according to the rules of law for the interpretation of written instruments; and extrinsic evidence is not in general admissible to explain them (*h*). If therefore they extend in terms to guarantee indemnity against some particular defect of title, it is no defence to an action on the covenants to plead that the purchaser bought with notice of the defect and agreed to take the property subject thereto (*i*). So also if the words of the covenant

Where land is sold with notice of a defective title.

(*d*) *Great Western Ry. Co. v. Fisher*, 1905, 1 Ch. 316, 323; but see *Sutton v. Baillie*, 65 L. T. 528, where the costs of an appeal were allowed on the ground that it was reasonable, two judges of first instance having given conflicting decisions.

(*e*) Above, pp. 659—661; and observe the facts in *David v. Sabin*, above, p. 1040.

(*f*) *Lucy v. Jerington*, 2 Lev. 26; *Raymond v. Fitch*, 2 C. M. &

R. 588, 597—599.

(*g*) *Kingdon v. Nottle*, 1 M. & S. 351, 4 M. & S. 53; *King v. Jones*, 5 Taunt. 418; *Jones v. King*, 4 M. & S. 188.

(*h*) Above, pp. 781, 782 and n. (*a*).

(*i*) *Page v. Midland Ry. Co.*, 1894, 1 Ch. 11; *May v. Platt*, 1900, 1 Ch. 616; *Great Western Ry. Co. v. Fisher*, 1905, 1 Ch. 316, 322; see above, pp. 203, 644, 645.

comprehend a particular defect of title, it is no plea to point out that the defect was apparent on the face of the conveyance (*k*); unless it can be established that upon the true construction of the whole deed of conveyance the assurance was expressly made subject to the defect and the covenant did not guarantee indemnity against it (*l*). But if in these cases the purchaser bought subject to the defect, the vendor might counterclaim for rectification of the conveyance by limiting the covenants according to the parties' real agreement (*m*).

Covenants
for title pro-
cured by
fraud.

It was held in the case of *David v. Sabin* (*n*) that, if a man by fraud procure land to be sold and conveyed to him, with the usual vendor's covenants for title, the vendor may indeed set up the fraud as a defence to an action brought on the covenants by the purchaser himself; but if the defrauding party convey the land over to a purchaser taking it for value and without notice of the fraud, and such purchaser sue the original vendor to obtain the benefit of *his* covenants for title, as running with the land sold, the original vendor can no longer plead the fraud, by which he was induced to enter into the covenants. This was so decided on the following grounds:—The defence of the original vendor to an action by the original purchaser on the covenants for title might be two-fold; first, that the covenants were voidable as having been procured by fraud and that he elected to avoid them (*o*); secondly, that the *breach* of the covenants was caused by the covenantee's own wrong, and the covenantee could not therefore set up the breach as a cause of action (*p*). As to the first of

(*k*) *Page v. Midland Ry. Co.*, 1894, 1 Ch. 11; *Great Western Ry. Co. v. Fisher*, 1905, 1 Ch. 316, 322.

(*l*) See above, pp. 644, 645, 658, n. (*r*).

(*m*) See above, pp. 644 and n. (*k*), 665, 782 *sq.*, 787–791, 803.

(*n*) 1893, 1 Ch. 523; above, pp. 661, 1140.

(*o*) Above, p. 1079.

(*p*) This was the case in *David*

these defences, it was considered that where a man makes a conveyance of land and at the same time enters into covenants with his grantee, of which the benefit will run with the land (that is, will go to the grantee's assigns by virtue of the "real contract" then made by the grantor (*q*)), such conveyance and real contract together form one entire transaction, and the real contract cannot be rescinded for fraud without setting aside the conveyance. And as in such case the conveyance cannot be avoided by the grantor as against any person claiming as a purchaser from the grantee for value and without notice of the fraud (*r*), the real contract must remain equally unimpeachable as against such a purchaser. And as regards the second defence above mentioned, that is only available against the party who actually did the wrong, or his representatives in law, and not against his assigns.

It appears that, under the present Bankruptcy law, the liability of a person, who has entered into covenants for title, in so far as it consists in any obligation or possibility of an obligation to pay money on breach of the covenants, is capable of proof in his bankruptcy, and will be discharged by an order of discharge made or by a composition or scheme of arrangement approved therein (*s*). But the covenantor's liability under a covenant for further assurance, in so far as it is capable of being enforced *specifically* (*t*), is not capable of proof in nor discharged by his bankruptcy (*u*), but may be asserted against the trustee in the bankruptcy, or

Bankruptcy
of covenantor
for title.

v. *Sabin*, where the fraud of the covenantee caused an incumbrance to remain outstanding without the knowledge of the covenantor, and so occasioned the breach of covenant; see above, p. 1140.

(*q*) See *Stevenson v. Lambard*,

2 East, 575, 580; Sug. V. & P. 576.

r Above, pp. 757, 758, 832.

(*s*) See above, p. 1022; *Hardy v. Fothergill*, 13 App. Cas. 351.

(*t*) See above, p. 1149.

u See *Re Ross*, 1904, 2 K. B. 769, 777, 781, 787.

against the covenantor himself after his discharge, or his representatives in law or gratuitous or equitable assignees (*x*).

If one sell land and execute a defective conveyance, he will be bound in equity to make good the contract out of any estate in the land that he may afterwards acquire.

We have seen that if, without making any fraudulent misrepresentation, a man sell lands, to which he has no good title, and convey the same to the purchaser, but give him no covenants for title, or covenants not availing against the defect (*y*), the purchaser has no right or equity to recover the purchase money in case of his ejectment after the conveyance, and has in general no remedy (*z*). There is however one contingency in which he may obtain satisfaction. If the vendor should chance to acquire by any means after the conveyance some valid estate or interest in the land sold, he will be bound in equity to assure the same in such manner as will make good his contract of sale (*a*). For in such case the rule of equity is that, as the conveyance has proved to be defective, the vendor shall not plead that the contract has been already discharged by performance (*b*). And this rule is applicable to any contract to convey land for valuable consideration, and to agreements of mortgage, settlement or exchange as well as of sale (*c*). It was suggested in one case (*d*) that this equity is personal to the contractor and is not available against his successors in estate. This opinion however was judicially dissented from by Lord St. Leonards (*e*),

(*x*) Above, pp. 1150, 1151 and n. (*e*).

(*y*) Above, pp. 647, 1137.

(*z*) Above, pp. 611, 653, 654, 730, 1132, 1137.

(*a*) *Seabourne v. Porel*, 2 Vern. 11; *Nol v. Buckley*, 3 Sim. 103, 116; *Jones v. Kearney*, 1 Dru. & War. 134, 158-160; *Smith v. Baker*, 1 Y. & C. C. C. 223; *Smith v. Osborne*, 6 H. L. C. 375, 390, 398; *Re Bridgewater's Settle-*

ment, 1910, 2 Ch. 342; *Sugr. V. & P.* 745; 2 Dart, V. & P. 808, 5th ed.; 909, 6th ed.; 818, 7th ed.

(*b*) Above, p. 1023.

(*c*) See cases cited in note (*a*), above.

(*d*) *Morse v. Faulkner*, 1 Anst. 11, 14.

(*e*) *Jones v. Kearney*, 1 Dru. & War. 134, 159.

and appears to be unsound in principle (*f*). The true rule seems to be that, if the vendor himself had once become entitled to a valid estate in the land, the purchaser's equity would attach upon it in the hands of all persons claiming under the vendor, otherwise than for a legal interest by purchase for value without notice (*g*). But of course if the vendor's eldest son and heir or other successor should acquire a valid interest in the land sold by an independent title, not derived from the vendor, he would not be bound to give effect to the sale (*h*). And if the vendor had sold and conveyed some particular estate or interest only in the land or such interest as he had therein, so that the conveyance actually gave effect to the contract, but the interest conveyed afterwards came to an end, the vendor would not be bound to assure to the purchaser any new estate or interest which he might acquire after the conveyance (*i*).

As previously explained (*k*), if the conveyance to the purchaser contained a precise averment of the vendor's seisin in fee or other right, sufficient to work an estoppel at law, then if the vendor had not the estate specified at the time of conveyance but afterwards acquired it, the same would immediately pass in effect to the purchaser, his heirs or assigns, without any further conveyance, by reason of the doctrine that the acquisition of the legal estate "feeds" the estoppel. An estate by estoppel of this kind would be available in favour of the purchaser, his heirs and assigns, as against all persons claiming the whole or any part of the vendor's

Vendor's
after-acquired
estate passing
to the purchaser by
estoppel.

(*f*) 2 Dart, V. & P. 809, 810, 5th ed.; 910, 911, 6th ed.; 819, 820, 7th ed.

(*g*) See *Martin v. Seamore*, 1 Ch. Ca. 170; *Taylor v. Wheeler*, 2 Vern. 564; *Jennings v. Moore*,

ib. 609; and cf. above, pp. 1149, 1150.

(*h*) Cf. above, p. 1150.

(*i*) See *Smith v. Osburn*, 6 H. L. C. 375, 390, 398; above, p. 1151.

(*k*) Above, pp. 622, 623.

after-acquired estate by any title derived from him, whether gratuitously or for value and whether for a legal or an equitable interest (*l*). But the legal estate would not so pass as against any person not bound by the estoppel (*m*).

(*l*) See *Raulins' case*, 4 Rep. 52 a, 53 a; *Wcale v. Lower*, Pollexf. 54, 66; *Taylor v. Needham*, 2 Taunt. 278; *Bousley v. Burdon*, 2 S. & S. 519, 524, 525, affirmed, 8 L. J. (O. S.) Ch. 85; *Doc d. Christmas v. Oliver*, 10 B.

& C. 181; *Webb v. Austin*, 7 Man. & Gr. 701, 724 sq.; *Doc d. Gaisford v. Stone*, 3 C. B. 176; *Clemm v. Geach*, L. R. 6 Ch. 147.

(*m*) See *Doc d. Dawne v. Thompson*, 9 Q. B. 1037.

CHAPTER XX.

OF THE SALE OF REGISTERED LAND.

THE principles to be applied in carrying out a sale of land registered under the Land Transfer Acts, 1875 and 1897 (*a*), depend upon the provisions of these statutes and the rules made thereunder (*b*), and especially upon the effect thereby given to first registration under the Acts, and to registered transfers and charges of registered land (*c*). It would be out of place in a work like the present to give a general description of the system of a registration of title established by these statutes. A short account of it is contained in the writer's last edition of "Williams on Real Property" (*d*), and it will be assumed that the reader has a general acquaintance with the statutory provisions in question. We will here confine our attention to the sale of registered land, and will follow the plan, previously adopted with respect to the general law of sale (*e*), of endeavouring to ascertain what are the provisions of an open contract for the sale of registered land.

Land registered under the Land Transfer Acts.

In the first place, it may be noted that contracts to sell registered land are not capable of registration nor required to assume any special form. They are governed

Contracts to sell registered land.

(*a*) Stats. 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(*b*) See Land Transfer Rules, 1903 and 1908.

(*c*) See stats. 38 & 39 Vict. c. 87, ss. 7—9, 13, 22, 25—27, 31, 32, 35; 60 & 61 Vict. c. 65.

First Schedule; Land Transfer Rules (1903 and 1908), 52—59, 140—142; Wms. Real Prop. 643—648, 21st ed.

(*d*) Part VII., pp. 635 *sq.*, 21st ed.

(*e*) Above, pp. 31 *sq.*

by the general law relating to the formation of contract (*f*). They must, of course, conform with the requirements of the Statute of Frauds (*g*), and, subject to the express enactments of the Land Transfer Acts (*h*), they appear to incorporate the terms implied by law in any other contract for the sale of land (*i*), including the provisions annexed to sales of land by the Vendor and Purchaser Act, 1874 (*k*), and the Conveyancing Act of 1881 (*l*). The express enactments of the Land Transfer Acts regulating contracts for the sale of registered land are the following:—

Proof of title, which can be required on purchase of registered land.

(Land Transfer Act, 1897 (*m*), s. 16, sub-s. 1.) A purchaser of registered land shall not require any evidence of title, except—

Matters declared not to be incumbrances.

- (i) the evidence to be obtained from an inspection of the register, or of a certified copy of or extract from the register;
- (ii) a statutory declaration as to the existence or otherwise of matters which are declared by sect. 18 of the principal Act (*n*), and by this Act, not to be incumbrances (*o*);

(*f*) Above, pp. 1—30.

(*g*) Stat. 29 Car. II. c. 3, s. 4; above, pp. 3 *sq*.

(*h*) See stat. 60 & 61 Vict. c. 65, ss. 8 (2, 3), 16, stated below.

(*i*) Above, pp. 32—35, 39—55; and see p. 100 and n. (*d*).

(*k*) Stat. 37 & 38 Vict. c. 78, ss. 1, 2.

(*l*) Stat. 44 & 45 Vict. c. 41, s. 3.

(*m*) Stat. 60 & 61 Vict. c. 65.

(*n*) The Land Transfer Act, 1875; stat. 38 & 39 Vict. c. 87.

(*o*) By stat. 38 & 39 Vict. c. 87, s. 18, as amended by 60 & 61 Vict. c. 65, First Schedule, all registered land shall, unless under the provisions of the Acts the contrary is expressed on the register, be deemed to be subject to such of the following liabilities, rights and interests as may be for the time being subsisting in reference thereto, and such liabilities, rights and interests shall not be deemed incumbrances within the meaning of the Acts (that is to say):

(1) Liability to repair highways by reason of tenure, quit rents, Crown rents, heriots and other rents and charges having their origin in tenure; and

(2) Succession duty, estate duty, land tax, tithe rentcharge and payments in lieu of tithes or of tithe rentcharge; and

(3) Rights of common, rights of sheepwalk, rights of way, watercourses, and rights of water, and other easements; and

(iii) if the proprietor of the land is registered with an absolute. Where title absolute.

(4) Rights to mines and minerals created previously to the registration of the land or the 1st of January, 1898; and

(5) Rights of entry, search, and user, and other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals, or of property in mines or minerals, and created previously to the registration of the land or the 1st of January, 1898; and

(6) Rights of fishing and sporting, seignorial and manorial rights of all descriptions, and franchises exercisable over the registered lands; also liability to repair the chancel of any church, liability in respect of embankments and river walls, and drainage rights, customary rights, public rights, and profits *à prendre*; and

(7) Leases or agreements for leases and other tenancies for any term not exceeding twenty-one years, or for any less estate, in cases where there is an occupation under such tenancies; also, subject to the provisions of the Land Transfer Act, 1897 (see sect. 12), rights acquired or in course of being acquired under the Limitation Acts:

Provided as follows:

(a) Where it is proved to the satisfaction of the registrar that any land registered, or about to be registered, is exempt from land tax or tithe rentcharge, or from payments in lieu of tithes or of tithe rentcharge, the registrar may notify the fact on the register in the prescribed manner (see Land Transfer Rules (1903), 212); and

(b) The Commissioners of Inland Revenue shall, upon the application of the proprietors of any land registered or about to be registered, upon such declaration being made, or such other evidence being produced as the Commissioners require, and upon payment of the prescribed fee, grant a certificate that at the date of the grant thereof no succession duty is owing in respect of such land, and the registrar shall in the prescribed manner notify such fact on the register, and such notification shall be conclusive evidence of the fact so notified in respect of succession duty (see, however, stat. 60 & 61 Vict. c. 65, s. 13, which appears to supersede this provision); and

(c) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is vested in the proprietor of land registered or about to be registered, the registrar may register such proprietor in the prescribed manner as proprietor of such mines and minerals as well as of the land (see Land Transfer Rules (1903), 213); and

(d) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is severed from any land registered or about to be registered, the registrar may, on the application of the person entitled to any such mines and minerals, register him as proprietor of such mines and minerals in manner in the Act of 1875 mentioned (see sect. 82; Land Transfer Rules (1903), 71, 74). and upon such registration being effected shall enter on the register of the land a reference to the registration of such other person as proprietor of such mines and minerals (see Land Transfer Rules (1903), 214).

Where the existence of any such liabilities, rights or interests, as are mentioned in this section is proved to the satisfaction of the registrar, the registrar may, if he think fit, enter on the register notice of such liabilities, rights or interests, in the prescribed manner. This power shall be exercised in all cases where the abstract of title on first registration or on registration as qualified or absolute discloses the existence of any such liabilities as are mentioned in sub-sections 4

- absolute title (*p*), and there are incumbrances entered on the register as subsisting at the first registration of the land, either evidence of the title to those incumbrances, or evidence of their discharge from the register;
- Where title qualified. (iv) where the proprietor of the land is registered with a qualified title, the same evidence as above provided in the case of absolute title, and such evidence as to any estate, right, or interest excluded from the effect of the registration (*q*) as a purchaser would be entitled to if the land were unregistered;
- Where title possessory. (v) if the land is registered with a possessory title, such evidence of the title subsisting or capable of arising at the first registration of the land (*r*) as the purchaser would be entitled to if the land were unregistered.
- Where vendor not registered as proprietor. (Sub-s. 2.) Where the vendor of registered land is not himself registered as proprietor of the land or of a

and 5 (see Land Transfer Rules (1903), 215). Where an easement is registered as an incumbrance, the dominant and servient tenements shall be defined, if practicable and required by the parties. Notice of a power of re-entry and of a right of reverter may be entered on the register under this paragraph.

(*p*) As to the effect of the registration of land with an absolute title and the registered transfer of land so registered, see stat. 38 & 39 Vict. c. 87, ss. 7, 13, 30, 35, 105; Land Transfer Rules (1903), 55, 140; 2nd Rep. (1911) of Land Transfer Commrs. § 57.

(*q*) The registration of land with a qualified title and the registered transfer of land so registered do not affect or prejudice the enforcement of any estate, right or interest appearing by the register to be excepted from the effect of registration; stat. 38 & 39 Vict. c. 87, ss. 9, 31; Land Transfer Rules (1903), I. 36, III.: (1903), 52, 58, 59, 140. The rules of 1903 introduced a particular kind of qualified title called a good leasehold title. Registra-

tion of land with a good leasehold title and the registered transfer of land so registered do not affect or prejudice the enforcement of any estate, right or interest affecting or in derogation of the lessor's title to grant the lease; Rules, 56, 141.

(*r*) The registration of land with a possessory title and the registered transfer of land so registered do not affect or prejudice the enforcement of any estate, right or interest adverse to or in derogation of the title of the first registered proprietor, and subsisting or capable of arising at the time of registration of such proprietor; stat. 37 & 38 Vict. c. 87, ss. 8, 32; Land Transfer Rules (1903), 57, 142.

charge giving a power of sale over the land, he shall, at the request of the purchaser and at his own expense, and notwithstanding any stipulation to the contrary, either procure the registration of himself as proprietor of the land or of the charge, as the case may be, or procure a transfer from the registered proprietor to the purchaser.

(Sub-s. 3.) In the absence of special stipulation, a vendor of land registered with an absolute title shall not be required to enter into any covenant for title, and a vendor of land registered with a possessory or qualified title shall only be required to covenant against estates and interests excluded from the effect of registration, and the implied covenants under sect. 7 of the Conveyancing and Law of Property Act, 1881, shall be construed accordingly.

As to covenants for title.

(Sect. 8, sub-s. 2.) Where a land certificate (*s*) or an office copy of a registered lease (*t*) has been issued, the vendor shall deliver it to the purchaser on completion of the purchase, or, if only a part of the land comprised in the certificate or office copy is sold, he shall, at his own expense, produce or procure the production of, the certificate or office copy in accordance with this section for the completion of the purchaser's registration (*u*). Where the certificate or office copy has been lost or destroyed (*x*), the vendor shall pay the costs of the pro-

Delivery of land certificate.

(*s*) See stats. 38 & 39 Vict. c. 87, s. 10; 60 & 61 Vict. c. 65, s. 8; Land Transfer Rules (1903), 258—268.

(*t*) This was issued under the Land Transfer Act, 1875, on the registration of leasehold land; but under the Act of 1897 land certificates are issued on the registration of leasehold as well as of freehold land; stat. 38 & 39 Vict. c. 87, s. 16; Land Transfer Rules (1903), 65, 67.

(*u*) By stat. 60 & 61 Vict. c. 65, s. 8 (1), the land certificate or certificate of charge shall be pro-

duced to the registrar on every entry in the register of a disposition by the registered proprietor of the land or charge to which it relates, and a note of such entry is required to be officially endorsed thereon. And by the Land Transfer Rules (1903), 265, the registrar may require such certificate to be produced on any application for registration made by or with the consent of the registered proprietor of the land or of a charge or incumbrance.

(*x*) See sect. 8 (3).

ceedings required to enable the registrar to proceed without it.

What evidence of title can be required.

No abstract of registered instruments.

The above provisions are most important terms of an open contract for the sale of registered land, and must of course be considered in connexion with and as modifying the general law defining the relations of vendor and purchaser on a sale of land (*y*). The language of sect. 16 (1) (i) of the Land Transfer Act, 1897, is not clear: but as it is enacted that *the purchaser shall not require* any evidence of title *except* the alternatives specified, it appears that (save only as regards the registered lease upon the sale of registered leasehold land (*z*)) the vendor is not bound to furnish any abstract of any registered document (such as an instrument of transfer or charge) dealing with the land sold (*a*); and it seems to be in the option of the purchaser to require, as proof of the title to registered land, either the evidence to be obtained from an inspection of the register, or the evidence of a certified copy of or extract from the register. In order to avail himself of the former alternative he must obtain the authority of the vendor (*b*); and this, it is submitted, the vendor is bound to give. Having obtained such authority, the purchaser may either search the register himself or apply for an official search to

(*y*) Above, pp. 32—35, 40—54.

(*z*) See below, p. 1207.

(*a*) It has been suggested that, on a sale of registered land, the abstract will consist of a copy of the entries in the register; 1 Key & Elph. Prec. Conv. 242, 8th ed.; 252, 9th ed. But it is questionable whether the vendor is bound to deliver anything in the nature of an abstract of his title to any registered land sold, except as regards estates, interests or rights excluded from the effect of

registration. Where a vendor's title does not consist of a series of instruments of disposition, the whole ground for requiring an abstract appears to be taken away; see above, p. 105. And the language of the above mentioned enactment seems to preclude the purchaser from requiring any evidence of title other than that specified therein.

(*b*) Stat. 60 & 61 Vict. c. 65, s. 22 (7).

be made, and the issue of a certificate of the result (*c*). If the purchaser choose to require a certified copy of, or extract from, the register, and the vendor have none such in his possession, it appears that the purchaser must bear the expense of procuring the same (*d*). And if the purchaser obtain the vendor's authority to inspect the register, office copies of any entry in the register or of any document in the registry shall be issued, upon his application in writing, to him or his solicitor (*e*). The purchaser, it is thought, must also bear the expense of any statutory declaration which he may require under sect. 16 (1) (ii) of the Land Transfer Act, 1897, with regard to matters declared by sect. 18 of the Act of 1875 and the Act of 1897 not to be incumbrances (*d*). Sect. 16 (1) (ii) of the Act of 1897 (*f*) also lacks clearness of expression: but it is submitted that the existence or non-existence of the matters declared by the Acts not to be incumbrances is the only fact in connexion therewith as to which the purchaser is restricted to the evidence of the vendor's statutory declaration (*g*). If any such matters exist, they are not affected by the statutory provisions as to the effect of first registration and registered transfers (*h*). With respect to such matters, therefore, and also as to all other estates or interests excluded from the effect of registration—as, for instance, those expressly saved from the operation of registration with a qualified, a good leasehold, or a possessory title (*i*)—the sale of registered land appears to be governed by the general law. And if a man sell under an open contract any registered land which is subject to the existence of any

Expenses of copies of or extracts from the register, and statutory declaration as to matters not incumbrances.

(*c*) Land Transfer Rules (1903), 284—293.

(*d*) Stat. 44 & 45 Vict. c. 41, s. 3 (6); above, pp. 33, 45, 116, 1166.

(*e*) Land Transfer Rules (1903), 294.

(*f*) Above, p. 1166.

(*g*) It should be observed that some of these matters may be found noted in the register; above, p. 1167, n. (*o*).

(*h*) Above, p. 1165, n. (*c*).

(*i*) Above, p. 1163, nn. (*q*, *r*).

estates or interests included in those declared not to be incumbrances, and necessary to be conveyed in order to make a good title—as, for instance, rights to mines or minerals created previously to the registration of the land or the year 1898 (*k*)—he must, it is submitted, deliver an abstract of the title for the period required by law in the case of unregistered land, and duly verify such abstract by producing the same evidence as could be required on the sale of unregistered land. If this be not done, the purchaser may, it is thought, object to the title and repudiate the contract, as he might in the case of unregistered land (*l*); or he may call upon the vendor to remove the objection and require the concurrence of the persons entitled to the outstanding estates or interests: but if he take this course, he should make the requisition without prejudice to, and reserving his right to repudiate the contract (*m*).

The register is the only good evidence of title to registered land.

The principal thing, then, which a purchaser of registered land has to ascertain is that the vendor is registered as proprietor of the land sold with such a title, either absolute, good leasehold (*n*), qualified or possessory, as he claims to have (*o*). Of this fact, the register *alone* is good evidence. It is most important to observe this. Possession of a land certificate showing the vendor to be registered as such proprietor is not sufficient; for the vendor may have created a statutory charge on the land without handing over the land certificate to the chargee, and the chargee may have subsequently sold the land under his power of sale, and the purchaser from him may have been registered as pro-

(*k*) Above, p. 1167, n. (*o*); see stat. 60 & 61 Vict. c. 65, First Schedule, amending sects. 18 (1, 5), 30—33, and 35—38 of the Land Transfer Act, 1875.

(*l*) See above, p. 167.

(*m*) See above, pp. 168, 190.

(*n*) See above, p. 1168, n. (*q*).

(*o*) The vendor may also make a good title as the registered proprietor of a registered charge giving power of sale; a case dealt with further on.

prietor (*p*), or the chargee may have foreclosed and procured himself to be registered as proprietor (*q*). It is essential, therefore, for a purchaser of registered land to ascertain the present state of the register, either by actual inspection or fresh certified copies (*r*). This will show him whether there are any estates, interests or rights (other than those declared not to be incumbrances) which will not be either conveyed to him or else extinguished by the effect of the registered transfer of the land from the vendor to himself (*s*). Such estates, interests or rights may exist, as we have seen (*t*), in the form of (1) registered incumbrances created either before or after registration, and (2) things exempted from the effect of registration with a good leasehold (*u*), qualified or possessory title; besides which there are (3) the things declared by the Acts not to be incumbrances. All such estates, interests or rights, as would interfere with the acquisition by the purchaser of the estate contracted for must be got in or cleared away. If existing in the form of registered incumbrances, they must be discharged (*x*); and if existing in the shape of things declared not to be incumbrances or exempted from the effect of registration with a good leasehold, qualified or possessory title, the title thereto must be proved, and they must be conveyed or released in the same manner as if the land were not registered.

(*p*) In the absence of stipulation to the contrary, the proprietor of a registered charge is not entitled to have custody of the land certificate; and where a transfer of land is made by the registered proprietor of a charge in exercise of the power of sale conferred by the charge, it may be registered, and a new land certificate may be issued to the purchaser, without production of the former land

certificate; stat. 60 & 61 Vict. c. 65, s. 8 (4).

(*q*) See stat. 60 & 61 Vict. c. 65, s. 8; Land Transfer Rules (1903), 164.

(*r*) Above, pp. 1170, 1171.

(*s*) See above, pp. 1165, n. (*c*), 1168, nn. (*q*, *r*).

(*t*) Above, pp. 1166—1168.

(*u*) Above, p. 1168, n. (*q*).

(*x*) See stat. 38 & 39 Vict. c. 87, ss. 19, 28; Land Transfer Rules (1903), 17, 166, 216, 217.

Discharge of
registered in-
cumbrances.

Incumbrances
prior to first
registration.

Registered incumbrances may exist in the form either of incumbrances prior to first registration, which are now required to be entered in the register upon every first registration, whether with an absolute title or otherwise (*y*), or of incumbrances subsequent to registration, these being the registered charges which a registered proprietor is empowered by the Acts to make (*z*). It will have been observed that, with respect to registered incumbrances prior to first registration with an absolute title, the purchaser may require evidence either of the title to them or of their discharge (*a*). It is thought to lie in the purchaser's option which kind of evidence he will call for. Registered incumbrances prior to first registration may be either simply noted as such in the register, without any person being registered as the proprietor of them, or they may be entered as registered charges belonging to the persons entitled to them (*b*). In either case the cessation of the incumbrance may be notified in the register, by cancellation of the original entry or otherwise, on proof to the satisfaction of the registrar of the discharge of the incumbrance (*c*). Where no one has been registered as the proprietor of the incumbrance, the proof required, in case there has been no dealing with or transmission of the incumbrance, is either the instrument creating the incumbrance with a receipt or release thereon, signed by the incumbrancer, or an instrument of discharge in the form provided by the rules: but if there has been any dealing with or transmission of the incumbrance, the title to expunge the

(*y*) Land Transfer Rules (1908), I. 43, commencing 1st Jan. 1909, and replacing L. T. R. (1903), 19, 21, 46, 49, under which such incumbrances were only required to be registered on an application for first registration with an absolute title.

(*z*) See stats. 38 & 39 Vict.

c. 87, ss. 22—28; 60 & 61 Vict. c. 65, s. 9 (2—5); Land Transfer Rules (1903), 97 *sq.*, 158 *sq.*

(*a*) Above, p. 1168.

(*b*) See Land Transfer Rules (1903), 175—181.

(*c*) Stat. 38 & 39 Vict. c. 87, s. 19, amended by 60 & 61 Vict. c. 65, First Schedule.

same from the register must be proved as in cases of examination of title on first registration (*d*). Where any person has been registered as proprietor of the incumbrance, the cessation thereof may be notified in the register on production of an instrument of discharge executed by the registered proprietor thereof (*e*) and of the certificate of incumbrance (*f*). It does not appear, however, that notifying in the register the cessation of such an incumbrance operates as a reconveyance of the legal estate, where the incumbrance was created by a mortgage in the usual form made when the land was unregistered; though, of course, after satisfaction of the charge the legal estate would be held in trust for the registered proprietor of the land, and would be extinguished by the effect of a registered transfer for value subsequently made by him (*g*). A purchaser from the registered proprietor of the land would therefore get the legal estate on registration of the transfer to himself, provided that the registered incumbrances were discharged prior to or on completion. Where the persons entitled to incumbrances prior to first registration with an *absolute* title have been entered in the register as the proprietors thereof, it appears unnecessary for the purchaser to investigate their title (*h*). The only essential thing is that the incumbrances shall be discharged and cleared off the register; after which the purchaser (in the case of freeholds) will get the

Instrument
of discharge.

Where the
proprietor-
ship of the
incumbrance
is registered,
and the title
to the land
is absolute.

(*d*) Land Transfer Rules (1903), 216; see L. T. R. (1908), I, 19, 24-26; L. T. R. (1903), 166, and First Schedule, Form 48.

(*e*) L. T. R. (1903), 217. It appears that an instrument of discharge need not be executed as a deed, but must be signed by the registered proprietor of the charge; rr. 107, 166, 177. Such signature should be attested; but

cf. rr. 107, 108 with Form 48 in First Schedule.

(*f*) Ibid. r. 181: above, p. 1169, n. (*u*).

(*g*) Above, pp. 1165, n. (*c*), 1168, n. (*p*); below, pp. 1181, 1182.

(*h*) Their title is required to be proved in the registry before they can be entered as proprietors of the incumbrances; Land Transfer Rules (1903), 175.

Where the registered title to the land is possessory.

entire fee simple by the effect of the transfer to himself, duly completed by registration, from the vendor registered with an absolute title (*i*). All that the purchaser need require is that the registered proprietors of the incumbrances shall execute the necessary instruments of discharge, which may be either contained in separate documents or included in the instrument of transfer to himself (*j*), and shall produce their certificates of incumbrance. But where the purchaser is buying land registered with a possessory title only, and there are registered incumbrances, prior to first registration, whereof the proprietorship is registered, it is essential for him to investigate the title to the incumbrances in the same manner as if they were not registered. For in such case his own registration as proprietor will not have the effect of extinguishing *all* unregistered estates and interests, but will take effect subject to any estate, right or interest adverse to or in derogation of the estate of the first registered proprietor, and subsisting or capable of taking effect at the time of the first registration (*k*). And although a mortgagee is required to prove his title before he can be registered as the proprietor of an incumbrance prior to first registration (*l*), his registration as such proprietor has not any extinguishing effect upon any estates, rights or interests adverse to his own (*m*).

(*i*) Land Transfer Rules (1903), 166, 182.

(*j*) Above, pp. 1165, n. (c), 1168, n. (p); below, pp. 1181, 1182.

(*k*) Above, p. 1168, n. (c); below, pp. 1181, 1182.

(*l*) Above, p. 1175, n. (h).

(*m*) The effect of the registration of any person as the proprietor of a registered incumbrance prior to first registration appears to be to confer on him a statutory charge similar to that given by the Land

Transfer Acts to a chargee from a registered proprietor; see stat. 60 & 61 Vict. c. 65, s. 22 (6 c); Land Transfer Rules (1903), 175—181. But the Acts do not give to a registered chargee or to a registered transfer thereof any such vesting and extinguishing effect as they give to first registration as proprietor of the land or to registered transfers of the land; see *A.-G. v. Odell*, 1906, 2 Ch. 47, 70—73, 78.

Where incumbrances prior to first registration are simply noted in the register, without any registered proprietor thereof, then (whether the registered title to the land be absolute or otherwise) the purchaser must require the title thereto to be abstracted and produced in the same manner as if the incumbrances were not noted in the register; for he must satisfy himself that such evidence can be produced of the title to the incumbrances and of their discharge as shall be sufficient to procure their removal from the register (*n*). With respect to registered charges created subsequently to the registration of the land, the principal thing to be required is that they shall be discharged and cleared off the register. The cessation of such charges may be notified on the register, by cancellation of the original entry or otherwise, either on the requisition of the registered proprietor of the charge or on due proof of the satisfaction thereof; and thereupon the charge shall be deemed to have ceased (*o*). The proof usually required is the production of an instrument of discharge signed by the registered proprietor of the charge (*p*): but the registrar may accept such other proof as he shall deem sufficient (*q*). In any case the certificate of charge must also be produced (*r*). Whenever registered land is subject to any registered incumbrances or charges, the purchaser must of course not pay the purchase money to the vendor, until the incumbrancers have been first fully satisfied thereout, except with their consent (*s*). Where, as usually happens, the incumbrances are to be discharged out of the purchase money, the necessary instruments of discharge will generally be included in the instrument of transfer to

Where the proprietorship of the incumbrance is not registered.

Registered charges subsequent to registration.

(*n*) Above, p. 1173.

(*o*) Stat. 38 & 39 Vict. c. 87, s. 28, amended by 60 & 61 Vict. c. 65, First Schedule.

(*p*) See note (*c*), p. 1175, above.

(*q*) Land Transfer Rules [1903], 166.

(*r*) Above, p. 1169, n. (*u*).

(*s*) Above, pp. 737, 740.

the purchaser (*t*). Where the registered proprietor of a registered incumbrance or charge is willing to concur in a transfer on a sale by the registered proprietor of part of the land charged, without receiving any part of the purchase money (*u*), he must execute an instrument of discharge (*x*) to exonerate the land sold from the charge; and his certificate of incumbrance or charge must be produced (*y*). In such cases the transfer and the discharge will, as a rule, be included in one instrument.

Notices,
cautions,
inhibitions,
restrictions.

Besides getting in all outstanding estates, interests or rights, which would not be conveyed or extinguished by a registered transfer, a purchaser of registered land must see that the vendor's title is not impeached or affected by any registered notices, cautions, inhibitions or restrictions. An inspection of the register will show whether any notices, cautions, inhibitions or restrictions (*z*) have been entered with respect to the land sold; and if there should be any such, the purchaser should require the vendor, in the case of cautions or inhibitions, to procure their removal from the register (*a*), and in the case of restrictions, either to procure their removal from the register or to procure the conditions imposed thereby to be complied with, as the circumstances of the case may require. In the case of notices, which are either of leases or agreements for leases, where the term granted is for or determinable on life, or exceeds twenty-one years, or where the occupa-

(*t*) Above, p. 1176.

(*u*) Above, p. 636. It seems that in this case the purchaser may disregard any notice, which he may receive off the register, that the registered proprietor of the incumbrance or charge is a trustee: below, pp. 1189 *sq.*

(*x*) Above, p. 1175, and n. (*c*).

(*y*) Above, p. 1169, n. (*a*).

(*z*) See stat. 38 & 39 Vict. c. 87, ss. 53—59; Land Transfer Rules (1903), 223—242.

(*a*) The purchaser should not, it is thought, make any inquiry as to the interest of any person entitled to the benefit of a caution or an inhibition; he should simply require the same to be removed.

tion is not in accordance with the lease or agreement, or of estates in dower or by the curtesy, or of liens by deposit of the land certificate, what appears on a sale by open contract of land in possession is that the vendor cannot make a good title without the concurrence of some other person; and the purchaser should take the same course as he would adopt if similar facts were disclosed on the investigation of title to unregistered land. If the interest of the other person be such that the vendor is entitled, either absolutely or on the terms of paying him off, to direct him to concur in the conveyance to the purchaser, the purchaser should require the vendor to obtain such concurrence. If the vendor should have no such right to direct the other person to convey, the purchaser would be entitled to object to the title; but he might, instead of repudiating the contract, require the vendor to procure the other person's concurrence in the sale (*b*).

The purchaser of registered land must not only obtain the evidence to be afforded by inspection or certified copies of the register, but must also require the land certificate to be produced for the purpose of completing the transfer of the land sold to himself, for without this his own registration as proprietor of the land cannot be effected (*c*). Thus, although possession of the land certificate is no guarantee that the vendor is registered as proprietor of the land (*d*), its absence cannot be disregarded. The vendor may have created a lien on the land sold by depositing the land certificate as security for an advance *e*; and notice of such a transaction need not, although it may (*f*), appear on the register.

Production of
the land
certificate.

Charge by
deposit of
the land
certificate.

b) See above, pp. 164-169, 190.

(*c*) Above, p. 1169 and n. *qu*.

(*d*) Above, p. 1172.

(*e*) See stat. 60 & 61 Vict. c. 65, s. 8 (4).

(*f*) See Land Transfer Rules (1905, 243-251; above, p. 1178).

If the vendor should have so charged the land, the essential thing for the purchaser to secure is that the land certificate shall nevertheless be produced as above required, and the registered notice (if any) of the deposit withdrawn (*g*). If the chargee require the whole or any part of the purchase money to be paid to him as the condition of allowing this, the condition must of course be complied with: but if not, it appears that, provided the land certificate be produced and the registered notice withdrawn as aforesaid, the purchaser need not have regard to any notice (outside the register) which he may receive of the charge (*h*). And if a chargee by deposit of the land certificate should allow the same to be produced and given up for the purpose of completing a registered transfer from the registered proprietor of the land, without insisting on being first paid off, it appears that he would be estopped from asserting any claim that he would otherwise have had to receive payment of the purchase money to such an extent as would be necessary to satisfy his charge (*i*).

Unregistered estates and interests in registered land.

Besides the estates and interests in registered land which will not be extinguished by a registered transfer, but of which the existence will be disclosed by the register, or should be disclosed by the vendor's declaration as to things declared not to be incumbrances (*k*), it is important to observe that registered land may be subject to all kinds of estates and interests, legal as well as equitable, which have been created by unregistered assurances or acts, and of which the existence will not

(*g*) See Land Transfer Rules 1903, 250; above, p. 1178.

(*h*) See below, pp. 1189 *sq.*

(*i*) The case is parallel to that of an equitable mortgagee by deposit of title deeds allowing the deeds to be handed over to a purchaser or subsequent mortgagee

from the mortgagor; see *Perry Herrick v. Attwood*, 2 De G. & J. 21; *Briggs v. Jones*, L. R. 10 Eq. 92; *Brocklesby v. Temperance, &c. Bdg. Socy.*, 1895, A. C. 173; *Rimmer v. Webster*, 1902, 2 Ch. 163.

(*k*) Above, pp. 1166, 1171.

be disclosed by the register. This is owing to the fact that under the Land Transfer Act, 1875 (*l*), *subject to the maintenance of the estate and right of the registered proprietor*, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests and equities in the same manner as he might do if the land were not registered. Such estates, interests, rights or equities, may or may not be guarded by a notice, caution, inhibition or restriction (*m*) placed on the register by the person entitled thereto. Now it appears that, in the absence of special stipulation, a purchaser of registered land has no right to require an abstract or production of any instrument, by which the registered proprietor of land has created any estates or interests of this kind (*n*), except only of documents creating interests which are by the Acts declared not to be incumbrances (*o*). The sole protection of the purchaser against estates or interests so created, whether legal or equitable, lies, therefore, in the effect given by the statute to a registered transfer of the land made for valuable consideration by the registered proprietor thereof (*p*), coupled with the enactment that neither the registrar nor any person dealing with registered land or a charge shall be affected with notice of a trust, express, implied or constructive (*q*). Now such a transfer, when registered, of freehold land, confers on the transferee an estate in fee simple in the land free from *all estates and interests whatsoever*, except (1) registered incumbrances, (2) interests by the Acts declared not to

Purchaser not entitled to an abstract of documents creating unregistered estates, except as to matters declared not to be incumbrances.

(*l*) Stat. 38 & 39 Vict. c. 87, s. 49; see *Capital & Counties Bank, Ltd. v. Rhodes*, 1903, 1 Ch. 631; Wms. Real Prop. 649, 674, 21st ed.

(*m*) Above, p. 1178.

(*n*) Above, pp. 1166 *sq.*

(*o*) Above, pp. 1166, 1171, 1172.

(*p*) Stat. 38 & 39 Vict. c. 87, ss. 30, 32, 35; Land Transfer Rules 1903, 140, 142.

(*q*) Stat. 60 & 61 Vict. c. 65, First Schedule, amending sect. 83 (1) of the Land Transfer Act, 1875.

Extinguish-
ment of un-
registered
estates by a
registered
transfer for
value.

At what time
is a purchaser
of registered
land bound to
pay the price
under an open
contract?

Time for
completion.

be incumbrances (*r*), and (3) where the transferor was registered with a qualified or a possessory title only, such rights or interests as are not affected by such registration respectively; and similar registered transfers of leasehold land have a like effect (*s*). It appears, therefore, that if the registered proprietor of registered land make any unregistered disposition either of the legal or of the equitable estate therein, all estates or interests created by such disposition (except those declared not to be incumbrances) will be extinguished if he subsequently execute a transfer thereof for valuable consideration, and the same be duly registered (*t*). It follows that the assurance to be made by a vendor to a purchaser of registered land is not really a conveyance of the vendor's own estate, but is essentially the execution of a statutory power (*u*), resembling that conferred by the Settled Land Act, 1882 (*x*), and enabling the vendor to transfer an estate which is not or may not be his own (*y*). It should, however, be noted that a transfer for valuable consideration does not have this effect until it has been completed by registration of the transferee as proprietor of the land. Prior to that time, the transferor is to be deemed to remain the proprietor of the land (*z*). This brings us to one of the most troublesome questions raised by the Acts: At what time and against what conveyance is a purchaser of registered land under an open contract bound to pay his purchase money?

The time for completion is of course when the vendor

r Above, p. 1166, n. *a*.

(*s*) Above, p. 1168, nn. (*p*, *q*, *r*).

t See Vaughan Williams, *L. J.*, *A.-G. v. Odell*, 1906, 2 Ch. 47, 63, 64, 70—73.

u. *Capital & Counties Bank, Ltd. v. Rhodes*, 1903, 1 Ch. 631, 655.

(*x*) Above, p. 306.

y See Wms. Real Prop. 120, 193, 648, 652, 21st ed. The transferee appears not to succeed

to the estate or ownership of the transferor, but to have an entirely new title conferred upon him by an exercise of sovereign authority; compare the case of the purchase of a ship sold in Admiralty proceedings *in rem*; Wms. Pers. Prop. 47, 16th ed.

(*z*) See stat. 38 & 39 Vict. c. 87, ss. 29, 30.

has shown such a title as the purchaser is bound to accept (*a*). When this time has arrived, the parties are bound to perform their respective duties of conveyance and payment (*b*). But as a purchaser of registered land depends so entirely for his protection on the effect of the statutory *power* of transfer given to the registered proprietor, it seems obvious that he cannot safely pay his purchase money until that power is completely executed; and by the general law of sale of land he is not bound to part with the price, except against complete conveyance to himself of the whole estate purchased (*c*). This takes place, as we have seen, when the transfer is completed by his registration as proprietor of the land: but owing to the course of procedure laid down in the Land Transfer Rules, 1903, it is impossible for payment of the price and completion of the registration to be exactly simultaneous. The one must either precede or follow the other. In this respect the most important rules are the following:—

(Rule 111.) Where instruments or applications are delivered at the registry with the proper Inland Revenue and Land Registry fee stamps affixed thereto or impressed thereon (*d*), accompanied when necessary by the land certificate or certificate of charge (*e*), they shall be examined by an officer of the registry, and if certified by him as capable of registration, they shall be entered in a book (*f*) in the order in which they are delivered. The registration shall then be completed *as of the day on which, and, in the absence of direction or inference to the contrary in or from the instruments or applications themselves, of the priority in which the instruments or applications were delivered.*

Relation back of registration to the time of delivery of the application therefor.

(Rule 118.) On the delivery for registration of an instrument or application, notice of the fact shall be sent to the person by whom it purports to be executed, and, where the instrument purports to be a conveyance or transfer in exercise of a power of sale contained either

Notice of application for registration to be sent to certain persons.

(*a*) Above, pp. 26, 575 *sq.*

(*b*) Above, p. 578.

(*c*) Above, pp. 386, 578, 733, 734, 737.

(*d*) See stat. 38 & 39 Viet. c. 87,

s. 83 (7); Land Transfer Rules, (1903), 123—125.

(*e*) See above, p. 1169, n. (*u*).

(*f*) This is called the Application Book.

in a mortgage prior to the registration of the land or in a registered charge, notice of the fact shall also be sent to the proprietor of the land and to the proprietors of all subsequent charges.

The notice shall state that the person to whom it is addressed will have three clear days from the posting of the notice within which to lodge objections. In the absence of any objection the registration may be completed at the expiration of the limited period.

Priority
notice.

(Rule 117.) The registered proprietor of land or of a charge or his solicitor, or with his consent in writing any other person or his solicitor, may lodge at the registry a notice (to be called a priority notice) in Form 19 in the First Schedule hereto reserving priority for a specified instrument or for a specified application intended to be subsequently made. The notice shall be accompanied by the land certificate or certificate of charge and shall be entered on the register and the certificate shall be endorsed accordingly. If within fourteen days from the lodging of the notice or such further time as the registrar shall think fit, the specified instrument or application is delivered for registration, it shall be registered *with priority to any other instrument or application affecting the same land or charge which may have been delivered in the meantime*. On the expiration of the period fixed, as aforesaid, for the operation of the notice, it may be cancelled.

Provisional
registration.

(Rule 157.) (1) Upon the joint application in writing of the registered proprietor and of an intended purchaser of part of the land comprised in a title, accompanied by an instrument of transfer (executed as or as in the nature of an escrow by all necessary parties), the intended transferee may be provisionally registered as proprietor; and in such case a land certificate may be issued to the transferor showing the intended transferee as registered proprietor of the land mentioned in the instrument of transfer; but nevertheless during a period to be specified in the application (but not exceeding twenty-one days from the date thereof) such registration shall, subject as hereinafter provided, be deemed to be provisional only, and liable to cancellation under this rule; and unless completed as hereinafter provided such registration shall not be deemed to be registration within the meaning of sections 29 and 34 of the Act of 1875.

(2) At any time before the registration has been completed, the provisional registration may be cancelled and the instrument of transfer returned to the transferor upon (i) the delivery of the land certificate to the registrar to be cancelled, and (ii) the production of a statutory declaration by the transferor to the effect that any consideration expressed to be paid or given for the transfer has not been paid or given, and (iii) the service of such notices as the registrar shall think fit.

(3) If such registration shall not have been cancelled then on the expiration of the period specified in the application (or sooner on the

production of the land certificate accompanied by the written application of the transferee or any person claiming under him for the registration to be immediately completed) the registration shall be completed and take effect *as of the day on which and of the priority in which the application for provisional registration was delivered to the registry*, and the instrument of transfer shall be deemed to have taken effect accordingly.

(4) Pending the completion of the registration the registrar shall make such provisional entries in the books kept in the registry as he shall deem necessary.

Now it is thought that, under an open contract for the sale of registered land, the vendor can have no right to require the purchaser to pay the price at the office of the vendor's solicitors on receipt of an instrument of transfer executed by the vendor (*g*). Such an instrument, unless it contain words sufficiently evidencing an intention to grant the estate, as well as to execute the statutory power, vests no estate at all in the purchaser prior to his registration as proprietor of the land (*h*). And if between the time of payment of the purchase money and that of the delivery of his transfer for registration, application were made at the registry for the registration of some other disposition by the vendor, capable of registration, or of an inhibition or a restric-

Vendor not entitled to demand payment against the execution of a registered transfer.

(*g*) It is submitted that the case is not parallel to that of the conveyance of land in a register county; see above, pp. 385, n. (*p*), 733, 734.

(*h*) It is submitted that the execution of an instrument of transfer is a mere step in the execution of the statutory power; and that, applying the ordinary rules with regard to the construction of instruments, which may operate either as an execution of a power or as a grant of an estate (see above, p. 538, n. (*c*)), an instrument of transfer in Form No. 20 in the First Schedule to the Land Transfer Rules, 1903, merely exhibits an intention to execute the statutory power, and

does not show any intention of granting the transferor's estate; unless words indicative of an intention to grant the estate be added thereto. The fact that the form in question contains no words of inheritance is thought to confirm this view. If words of inheritance alone should be added to the form, the question would be raised whether this showed an intention to grant the estate: but these words would hardly be conclusive. Where it is desired to include a conveyance of the transferor's estate in a registered transfer, express words of grant should be added, as well as the appropriate words of inheritance.

tion, it appears that the transfer to the purchaser would be postponed to the result of those prior applications. And this would equally be the case, although the transfer had contained a conveyance of the vendor's legal estate to the purchaser. It is thought that the vendor cannot require the purchaser to run these risks, however improbable it may be that he will incur any actual harm in the short interval between payment and registration. There appear, however, to be four ways in which the risk of adverse entries in the register, made subsequently to payment, may be avoided.

Completion
at the Office
of Land
Registry.

First, the purchase may be completed at the Office of Land Registry, the purchaser ascertaining there that no entries or applications adverse to his interest have been made up to the last moment, and paying his purchase money when the draft entries to be made in the register have been approved by the proper officer and the necessary documents are handed over to the clerk in charge of the Application Book (*i*). If this be done, it appears that his registration as proprietor, when completed, will relate back to the time of handing over the documents, that is, the time of payment (*k*). Secondly, the vendor may obtain a priority notice in favour of the transfer to the purchaser; in which case it appears that the purchaser may safely pay his purchase money, away from the Land Registry, against delivery to him of an instrument of transfer duly executed by the vendor and all other necessary parties, if any, and of the land certificate endorsed with the priority notice, provided that fourteen days from the lodging of the notice have not expired. In such case it appears that the registration, when completed, will relate back to the time of lodging the notice (*l*).

Priority
notice.

(*i*) See Brickdale & Sheldon's
Land Transfer Acts, 402, 2nd ed.

(*k*) Above, p. 1183.

(*l*) See above, p. 1184.

Thirdly, where the land sold was *part* only of that comprised in the vendor's title, the vendor and purchaser together may obtain provisional registration of the purchaser as proprietor of the land; when the purchaser may, it seems, safely pay the price on delivery to him of the land certificate made out in his name, provided that twenty-one days from the date thereof have not expired. If he obtain this, he can procure his own registration to be immediately completed, when it will relate back to the time of the application for provisional registration (*m*). Fourthly, the transfer may be registered (not provisionally) and the purchase money not paid over to the vendor until the land certificate made out in the purchaser's name has been issued.

Provisional
registration.

Complete
registration
before
payment.

Now the last of these methods of completion is obviously that most favourable to the purchaser: for he would not part with his purchase money until after the legal estate had been vested in him by the complete execution of the statutory power, and it had been ascertained that no objection to the registration of his transfer could be lodged by any person to whom notice of his application is required to be sent (*n*). But such registration would irrevocably vest the purchased estate in the buyer before the land certificate in his name was issued (*n*); and it appears that, in the ordinary course of procedure, the land certificate would be issued to the *purchaser*. It is thought that he has no right to require this to be done before payment (*o*). It seems, therefore, that this method of completion cannot be that contemplated by an open contract (*p*). Nor can it be implied

As to re-
quiring com-
plete regis-
tration before
payment.

(*m*) Above, p. 1181.

(*n*) See above, p. 1183.

(*o*) Above, pp. 578, 579.

(*p*) It is thought that the purchaser has no right to claim to complete in this manner, merely because of the notices required to

be sent out of his application for registration and of the time given for lodging objections thereunder; above, p. 1183. As to notice to the transferor, that appears to be simply a precaution against forgery; and the risk of forgery is

in such a contract that the purchaser shall, on the execution or on delivery for registration of the instrument of transfer, deposit the purchase money with a stakeholder, to be paid over to the vendor on the issue to the purchaser of the land certificate made out in his name (*q*). We are therefore driven to conclude that one of the first three methods of completion above mentioned must be that to which the parties are bound under an open contract: but in the absence of any expression of judicial opinion on the matter, it is impossible to say which. It is suggested, however, that the vendor may be entitled to object to the first of them on the ground that he cannot be required, against his will, to complete at the Land Registry (*r*); and the purchaser on the ground that a priority notice or provisional registration secures to him the assurance that notice of the application therefor has been sent out to the persons specified in the Rules, and no objection has been lodged in consequence. If so, it is thought that, where provisional

run on the completion of every sale of land. As to the notices, on the purchase from a mortgagee or chargee, to the persons entitled to redeem, the purchaser must of course ascertain that all these persons will be bound by the sale before he accepts the title; and having accepted it, he appears to be bound to complete, notwithstanding these notices.

(*q*) See above, pp. 27, 578. This course may be adopted by express stipulation where the purchase is by private contract. It is that which affords the greatest security to the purchaser, particularly where he is buying from a chargee under an exercise of the chargee's power of sale; as the purchase money is not handed over to the vendor until it has been finally ascertained that no person to whom notice is required to be sent can raise any objection to the purchaser's regis-

tration as proprietor of the land sold.

(*r*) It does not appear to have been precisely decided what is the proper place for completion of an open contract for sale of land. The purchaser is, however, bound to tender the conveyance for the vendor's execution, together with the price; above, pp. 35, 578. He must therefore go to the vendor, who is not bound to come to him; see Litt. s. 340; Co. Litt. 210 a, b. It is thought that the vendor may well appoint his own residence, or his solicitor's office, or on or near the land sold, or a convenient place in London, as the place for completion; see above, pp. 101, 737: but it would be a breach of duty for the vendor to be out of the country at the proper time for completion; *Re Young and Harston's contract*, 31 Ch. D. 174 (above, p. 68, n. (*t*)).

registration is possible, the vendor would have to give to the purchaser the choice of the other two alternatives. It can make no difference to the vendor which method of completion is adopted; in any case the whole expense of the purchaser's registration appears to form an item of the expense of the conveyance to the purchaser and so to fall upon the purchaser himself (s). Where provisional registration cannot be adopted, because the vendor is selling the whole of the land comprised in his title, it is thought that the vendor would be well advised to offer and the purchaser to accept completion by means of a priority notice. But of course, where a formal contract is made or where registered land is sold by auction, the place and manner of completion should be the subject of express stipulation (t).

The next point to be considered is whether a purchaser of registered land, who before completion receives notice of some unregistered estate, interest or equity, adverse to the vendor's registered estate, is bound to have regard thereto. It is submitted that he is not; that the effect of the enactments and rules above cited (u) is that priority of interest is to be determined by priority of registration alone, and that, so long as the persons claiming the unregistered interests do not protect themselves by a registered caution, notice, inhibition or restriction (x), anyone dealing with regis-

Is the purchaser bound to have regard to notice given to him of unregistered interests?

(s) See above, pp. 733, 735. Of course, the vendor must bear the expense of the execution by himself and all other necessary parties of the instrument of transfer or of otherwise clearing the register of incumbrances, or of getting in or releasing things declared not to be incumbrances or outstanding estates or interests not affected by registration; see above, pp. 1171, 1173.

(t) See above, p. 1188, n. 1.

(u) Above, pp. 1181, 1183.

(x) Above, p. 1178. It is thought that persons entitled to any unregistered estates or interests in registered land who do not protect themselves by such entries in the register as are available in and appropriate to the particular case, but allow the registered proprietor to remain the apparent owner on the register, with un-

tered land in such a way that he is about to become registered as the proprietor or a chargee thereof (*y*) is entitled, if he can, to gain priority of interest by procuring priority of registration, notwithstanding that he have notice, actual or constructive, of any unregistered interest whatsoever (*z*). And it is thought that if he so procure himself to be registered as proprietor of the land or a charge thereon, the adverse unregistered estates or interests will be extinguished, or will be postponed to the charge; and he will not be held to be a trustee of any legal estate or interest so acquired by him. It must be observed, however, that the Land Transfer Acts only provide that persons dealing with registered land or charges shall not be affected with notice of a *trust* (*a*); and that the effect of a registered transfer of registered freehold land is to vest in the transferee an estate in fee simple free from all *estates and interests* whatsoever other than those excluded from the effect of the registration (*b*). The question is thus raised, what is the position of a person dealing with registered land, who receives notice of a bare right or equity, not amounting to an *interest* (strictly so called) in the land, such as the right to set aside a prior conveyance thereof induced by fraud, duress or undue influence (*c*), or by the concealment of some relative

Notice of a bare right or equity.

restricted statutory powers of disposition, will be estopped from otherwise asserting their claims against persons taking under an exercise of any of such powers; see above, p. 1180, and n. (*i*). Consider also stat. 60 & 61 Vict. c. 65, s. 7 (3).

(*y*) It is thought that the provisions of the Land Transfer Acts as to notice (see above, p. 1181) would not be construed so as to absolve persons acquiring *unregistered* legal estates in registered land from the effect of notice of equities.

(*z*) See Cozens-Hardy, L. J., *Capital and Counties Bank, Ltd. v.*

Rhodes, 1903, 1 Ch. 631, 655, 656; and consider *Black v. Williams*, 1895, 1 Ch. 408, 421, decided on the Merchant Shipping Acts, 1854 and 1862, the language of which appears to be no stronger than, if so strong as, that of the Land Transfer Acts and Rules; *Barclay & Co., Ltd. v. Poole*, 1907, 2 Ch. 281, decided under the Merchant Shipping Act, 1894; but cf. 2nd Rep. (1911) of Land Transfer Commissioners, § 79.

(*a*) Above, p. 1181.

(*b*) Above, pp. 1168, nn. (*p, q, r*), 1181.

(*c*) Above, pp. 831, 851.

equitable disability? (*d*) Notice of such a right is no doubt notice of a trust to this extent, that it is notice that the person claiming under the conveyance is constructively a trustee for the person entitled to set it aside; and it is submitted that a person, so dealing with registered land as to be in the way of becoming the registered proprietor thereof or of a charge thereon, should not be affected by notice of such a trust, so long as the other refrains from asserting his right by registered inhibition or caution. Indeed, as the other's right is to set aside or affirm the conveyance at his election (*e*), it may be suggested that to refrain from procuring an inhibition or registering a caution, when informed of the proposed dealing with the land, is evidence of an intention to affirm the conveyance (*e*). Besides this, it is thought that the unregistered interests in registered land, which are extinguished by the registration of a transfer thereof for valuable consideration, are *interests* in the widest sense of the word and include, not only all bare rights of entry on or action to recover the land (*f*), but also all bare rights of action in equity to set aside a conveyance thereof for fraud or other cause (*g*). It seems, therefore, that a purchaser of registered land need have no more regard to notice of equities of this description than to notice of express trusts. It is submitted, however, that an intending purchaser or mortgagee of registered land cannot safely assume more than this:—that where, by the equitable rule of notice it would be merely a *technical* fraud in equity (*h*) to act in disregard of notice acquired

(*d*) Above, pp. 991—993.

(*e*) Above, pp. 828, 829, 852.

(*f*) See Co. Litt. 345 b.

(*g*) See *Gresley v. Mousley*, 4 De G. & J. 78, 93.

(*h*) That is, the kind of fraud which Courts of Equity held to

be committed when a purchaser or mortgagee of land in a register county registered his conveyance in priority to some previous assurance, of which he had notice: above, p. 375, n. (*o*).

of some unregistered estate or interest, he is at liberty, if he can, to acquire priority of interest by priority of registration. Thus, if the registered proprietor of registered land had made a settlement or an unregistered mortgage thereof, and the settlement or mortgage were not in any way protected on the register, it is thought that a person intending to take a registered transfer or charge of the land need not have regard to any notice which he may receive of the settlement or unregistered mortgage, so long as the persons claiming thereunder refrain from asserting their interests by some entry in the register (*i*). But where the unregistered right is not the consequence of some prior unregistered *disposition* by the registered proprietor, but is an equity arising from his actually fraudulent or blameworthy conduct (as in the case of a right to set aside the conveyance to himself for his fraud or undue influence), or where the intending purchaser has notice of facts showing that the registered proprietor is contemplating an actual fraud to the detriment of some person entitled to an unregistered interest, it is thought that the wording of the Acts is not so clear that the purchaser could be advised to act in disregard of the notice, without obtaining the direction of the Court.

Can a vendor of registered land enforce the contract where there are unregistered estates or interests outstanding in other persons?

It should be observed that in any case where it appears from information furnished by the vendor, or obtained elsewhere, that the registered proprietor of registered land is a trustee for some other person, without power of sale (*k*), or has created or is subject to any unregistered estate, interest or equity, adverse to his own registered proprietorship, it is questionable whether he is in a position to enforce, either specifically or at law, a contract made by himself alone for sale of the land:

(i) See above, pp. 1180, n. (i), v. *Hobson*, 1896, 2 Ch. 403, 412, 1181, 1190, n. (y); and *Battison* v. *Bank*, Above, p. 256.

for he has not shown what is requisite to establish a good title (*l*). The vendor may indeed allege that he has an over-riding statutory power of disposition, which is paramount to all unregistered interests (*m*); but he can only exercise this power to the prejudice of unregistered rights by a registered transfer *for value* or charge (*n*); and the question is whether he is enabled of his own motion so to put an end to unregistered estates, which may have been created by his own act and for value. The Court may possibly hold that the case is parallel to that of a sale, under the old law, of land which the vendor had already parted with by some voluntary conveyance (*o*); and that the Court will not interfere to assist the vendor to get rid, by registration of a transfer or charge from himself, of any lawful estates or interests which would otherwise remain perfectly valid. But if this should be so decided, it is thought that, as in the parallel instance (*o*), the *purchaser* would be entitled to enforce the contract in every case where the unregistered estate, interest or equity would be extinguished or defeated by the registration of a transfer from the registered proprietor to himself (*p*). If this suggestion be correct, a purchaser of registered land who had received notice of unregistered estates or interests adverse to the vendor's title, would have two courses open to him:—He might object to the

(*l*) Above, pp. 164—168.

(*m*) Above, p. 1182, n. (*n*).

(*n*) Transfers made without valuable consideration are subject, so far as the transferee is concerned, to any unregistered estates, rights, interests or equities, subject to which the transferor held the same; stat. 38 & 39 Vict. c. 87, ss. 33, 38.

(*o*) Above, p. 395, n. (*i*).

(*p*) The vendor could not raise the defence of want of mutuality if the purchaser sued for specific performance of the agreement:

above, pp. 1106, 1107; nor, it is thought, could he raise the defence of a superior equity (above, p. 1105); for the Land Transfer Acts appear to subject the estates and interests created by unregistered disposition to the estate created by the statutory power of disposition given to the registered proprietor; stat. 38 & 39 Vict. c. 87, s. 49; *Capital and Counties Bank v. Rhodes*, 1903, 1 Ch. 631, 655, 656; *Vaughan Williams, L. J., A.-G. v. Odell*, 1906, 2 Ch. 47, 63, 64, 70—73.

title, and refuse to complete except with the concurrence of all persons entitled to the unregistered interests (*q*); or, if the unregistered interests were such as would be extinguished by the transfer to himself and remained unprotected on the register, he might proceed with his purchase (*r*).

Restrictive
conditions.

Under the Land Transfer Acts (*s*), any conditions restrictive of the use of land, such as are capable of affecting assigns by way of notice (*t*), may be entered in the register. It is submitted that, unless such restrictive conditions be so entered in the register, or come under the head of rights or interests exempted from the effect of registration with a qualified, good leasehold or possessory title (*u*), a purchaser of registered land need pay no regard to any notice he may receive of the existence or creation of such conditions (*x*).

Searches on
purchase of
registered
land.

We see, then, that a purchaser of registered land is in effect relegated to the ordinary methods of investigation of title as regards any estates or interests which come under the description of (1) registered incumbrances prior to first registration, whereof the proprietorship is not registered (*y*); (2) matters declared by the Acts not to be incumbrances, or (3) estates or interests exempted from the effect of registration, with a qualified, good leasehold or possessory title (*z*); but that, except in respect of these estates or interests, his security lies in the inspection of the register and in the effect given by the Acts to a registered transfer for

(*q*). See above, pp. 166-169, 190.

(*r*). Above, pp. 1189 *sq.*

(*s*). Stat. 38 & 39 Vict. c. 87, s. 81, amended by 60 & 61 Vict. c. 65, First Schedule; Land Transfer Rules (1908), I. 43;

(1903), 223.

(*t*). Above, pp. 491 *sq.*

(*u*). Above, p. 1168, nn. (*q*, *r*).

(*x*). Above, pp. 1189 *sq.*

(*y*). Above, p. 1177.

(*z*). Above, pp. 1168, nn. (*q*, *r*), 1171, 1173.

valuable consideration (*a*). If the land purchased be subject to any estates or interests of the second or third kind (*b*), the purchaser must make the same searches in respect thereof as would be necessary on a purchase of unregistered land, according to the circumstances of the case (*c*). But except in these respects—that is to say, as regards the estate which will be vested in the purchaser by the registration of the transfer to him—it is a question whether he need make any searches outside the Land Register; for it may be contended that all such interests as are guarded against by searches on the sale of unregistered land will be extinguished, in the case of registered land, by the effect of a registered transfer for valuable consideration (*d*). Thus it is thought that all annuities (other than land charges) would be so extinguished, if not entered in the Land Register (*e*). And it may be argued that the charge obtained by the registration of a writ or an order enforcing a judgment or Crown debt against the land (*f*), any claim asserted by a registered *lis pendens* (*g*), and all land charges not registered in the Land Register (*h*),

Annuities.

Judgment
creditor's
charge.*Lis pendens*.

Land charges.

(*a*) Above, pp. 1172, 1181.

(*b*) With respect to any registered incumbrances prior to first registration, all that is necessary appears to be that they shall be cleared off the register: after which the registered transfer to the purchaser will have full effect: above, pp. 1174—1178.

(*c*) Above, pp. 580—609.

(*d*) Above, pp. 1168, *nn. op. p.*, 1172. This view was maintained in the first edition of this book, except as regards search in Bankruptcy.

(*e*) Above, p. 587. Annuities charged on registered land may be registered as charges thereon: stat. 60 & 61 Viet. c. 65, s. 9 (3); Land Transfer Rules (1903), 160.

(*f*) Above, pp. 581—587, 597.

(*g*) See above, pp. 593, 594, 597. It has been submitted (above, p. 1191) that the interests,

which may be extinguished by the registration of a transfer for value of registered land, may well include bare rights of action to recover or of suit affecting the land.

(*h*) Above, pp. 437 and *n.* (*a*), 588—593, 598. Under the Land Transfer Rules (1903), 15—170, all land charges, as defined therein, are capable of registration, and the definition given not only includes land charges as defined in the Land Charges Act, 1888, but extends to all rents or annuities or principal moneys charged on land in the manner mentioned in that Act, *whether upon the application of any person or not*. This appears to comprehend charges so imposed on land against the owner's will, as under sect. 257 of the Public Health Act, 1875, or the

would equally be defeated in this way, unless they should have been protected by a registered caution, inhibition or restriction (*i*). But doubts have lately been cast (*ii*) on the extinguishing effect of a registered transfer for valuable consideration upon land charges and upon interests or claims protected by writs and orders affecting land, when registered under the Land Charges Act, 1900 (*j*), or by registered *lis pendens*. In consequence of these doubts it appears to be equally advisable to search for writs and orders affecting land, for *lis pendens*, and (where necessary) for land charges, upon the sale of registered land as when the land purchased is unregistered (*k*). So also search in bankruptcy may possibly not be necessary on the sale of registered land: but it is thought to be advisable to make the same search in bankruptcy against the vendor's name as if the land were not registered (*l*).

Searches
advisable.

Bankruptcy

The search
in the Land
Register.

In searching the Land Register, a purchaser of registered land should examine the Property, Proprietorship and Charges Registers (*m*), the filed plan of the land registered (*n*), the list of pending applications, and the Day List (*o*). As we have seen (*p*), the purchaser may either search the register himself or procure an official search to be made and an official certificate of the result of the search to be issued (*q*). This search should be

Private Street Works Act, 1892; see above, pp. 177, 437, n. (*a*), 521, 591—593.

(*i*) See above, pp. 1178, 1189 and n. (*ix*), 1190.

(*ii*) See Appendix to 1st Rep. (1909) of Land Transfer Commrs., Minutes of Evidence, Q. 2041—2046; 2nd Rep. (1911), §§ 76, 77.

(*j*) See note (*f*), p. 1195, above.

(*k*) See above, pp. 597, 598.

(*l*) Above, pp. 594, 595. The reasons for this opinion are given in Appendix (D), below. See 2nd Rep. (1911) of Land Transfer Commrs., § 77.

(*m*) See Land Transfer Rules (1903), 2—11, 284.

(*n*) Ibid. Rules 2, 269—282, 285.

(*o*) Ibid. Rule 13; Brickdale & Sheldon's Land Transfer Acts, 37, 2nd ed.

(*p*) Above, p. 1170.

(*q*) By the Land Transfer Rules (1903), 293, where a solicitor or other person obtains an official certificate of the result of the search, he shall not be answerable in respect of loss that may arise from any error therein. When the certificate is obtained by a

made up to the last minute before the application is handed in for a priority notice or for provisional registration in order to complete the purchase (*r*); so that it may be ascertained that no application is pending which may possibly take priority over the transfer to the purchaser. If the purchase is to be completed at the Land Registry without a priority notice or provisional registration (*s*), or is to be completed by securing the purchaser's final registration before payment of the price (*t*), the search should be made up to the time of delivery of the application for the purchaser's registration.

On every sale of registered land, the purchaser must make the same inquiries as are necessary on the sale of unregistered land (*u*) to ascertain that the possession or enjoyment of the land is in accordance with the title shown. For the land might be subject to some tenancy, easement or right which is not disclosed by the contract, and is amongst the things declared not to be incumbrances (*x*). It is thought that if the result of these inquiries be to ascertain the existence of some unregistered interest in the land (*y*), which would be extinguished by the registration of a transfer to the purchaser (such as a prior contract of sale or a right of pre-emption), he may nevertheless proceed with his own purchase, so long as the person entitled to the unregistered interest refrains from asserting the same by some entry in the register (*z*). Owing to the doubt above mentioned (*a*), whether unregistered land charges of any kind are extinguished by the effect of a registered transfer for valuable consideration, the same in-

Inquiries.

Land charges.

solicitor acting for trustees, executors or other persons in a fiduciary position, those persons also shall not be so answerable.

(*r*) Above, pp. 1188, 1189.

(*s*) Above, p. 1187.

(*t*) Above, p. 1187.

(*u*) Above, pp. 607—612.

(*x*) Above, p. 1166, n. (*e*).

(*y*) Above, p. 609.

(*z*) See above, pp. 1189 *sq.*

(*a*) Above, p. 1195.

quiries should be made respecting such charges as upon the sale of unregistered land (*b*).

Succession
and estate
duty charged
on registered
land.

A purchaser of registered land need make no inquiries with respect to any succession or estate duty, which may be charged thereon; except as regards things declared not to be incumbrances, and estates or interests exempted from the effect of registration with a qualified or possessory title (*c*), as to which he must observe the same precautions as are incumbent on the purchase of unregistered land (*d*). For by the Land Transfer Act, 1897 (*e*), succession duty and estate duty shall not affect a *bonâ fide* registered purchaser (*f*) for full consideration in money or money's worth, although he may have received extraneous notice of the liability in respect thereof, unless (1) the liability be noted in the register (*g*), or (2) in the case of a possessory title the liability to the duty were at the date of the original registration of the land, subsisting or capable of arising, or (3) in the case of a qualified title the liability to the duty were included in the exceptions made on such original registration of the land. Of course, where any such liability is noted in the register, it must be discharged.

Purchaser
should lodge
a caution.

A purchaser of registered land is advised to lodge a

(*b*) See above, pp. 177, 178, 137, and n (*a*), 591—593, 607—609.

(*c*) Above, pp. 1166, n. *o*), 1168, nn. (*q*, *r*).

(*d*) Above, p. 174; below, pp. 1260 *sq.*

(*e*) Stat. 60 & 61 Vict. c. 65, s. 13 (3).

(*f*) It is presumed that the registered proprietor of a registered charge would be held to be a purchaser to the extent of the charge.

g. By sub-sects. 1, 2, on every

application to register land with an absolute title, or to register a transmission of land, the registrar shall inquire as to succession duty and estate duty. And if, on such application, it appears that there is, or is capable of arising, any such liability to succession duty or estate duty as would affect the purchaser from the person to be registered as proprietor, if the land were unregistered, the registrar shall enter notice of the liability on the register in the prescribed manner. See Land Transfer Rules (1903), 208—211.

caution in the Land Registry (*h*), immediately on signing the contract of sale. This will ensure that no registered disposition of the land shall be made to his prejudice before completion, without his being informed of it and having an opportunity of procuring an inhibition to restrain it (*i*).

A transfer of registered land is effected by the execution of an instrument of transfer in the prescribed form, followed by registration of the transferee as proprietor of the land (*k*). The instrument of transfer is required to be executed as a deed in the presence of and attested by a witness, who must sign his name and add his address and description (*l*). It must, of course, be executed by the registered proprietor in person or by attorney (*m*); but except where an entry has to be made in the register in derogation of the estate passing to the transferee, as in the case of a sale subject to restrictive conditions (*n*), it need not be executed by the transferee. As already mentioned (*o*), it is thought that a simple instrument of transfer in the form given in the Land Transfer Rules, 1903 (*p*), operates by way of execution of the statutory power of transfer and not of grant of the registered proprietor's estate. It is, however, usual, *ex abundanti cautela*, to insert in the instrument of transfer words of grant of the estate (*q*), in order that the transferee may at least obtain the unregistered legal estate at the time of payment of the

Transfer of
registered
land, how
effected.

h Above, p. 1178 and n. *z*.
(*i*) See stat. 38 & 39 Vict. c. 87, ss. 53—57; Land Transfer Rules (1903), 226—241.

(*k*) Stat. 38 & 39 Vict. c. 87, ss. 29—39; Land Transfer Rules (1903), 97—157, 182.

(*l*) Land Transfer Rules (1903), 107—110.

(*m*) See above, p. 739; and see Land Transfer Rules (1903), 110, requiring the power of attorney,

or an office copy thereof, to be produced to the registrar, and the original power to be filed in the Central Office or the Land Registry.

(*n*) Above, p. 1191; Land Transfer Rules (1903), 153; and First Schedule, Form 41.

(*o*) Above, p. 1185, n. (*k*).

(*p*) First Schedule, Forms 20 *sq.*

(*q*) See above, p. 1185, n. (*k*).

Whether
any other
assurance
than a regis-
tered transfer
is required.

purchase money. And there seems to be no objection to this, although the purchaser's real protection lies in the effect given by the Acts to the transfer completed by registration (*r*); and he should not part with his purchase money until satisfied that the statutory legal estate, to be conferred on him by his registration as proprietor, will vest in him by relation back as from the time of payment (*s*). Where the title to the whole estate purchased appears completely on the register, it seems quite unnecessary to supplement the instrument of transfer by any separate assurance of the land. This is the case where the vendor is registered as proprietor with an absolute title, and there are no estates or interests to be assured to the purchaser which are among the things declared not to be incumbrances (*t*); also where in the like case there are no other interests to be got in than registered incumbrances prior to first registration whereof the proprietorship has been registered, or registered charges created subsequently to registration (*u*). Where the registered proprietor of any registered incumbrance or charge executes an instrument of discharge, whether contained in a separate document or included in the instrument of transfer (*x*), words may be added assuring all his estate to the purchaser: but this is also of excess of caution rather than of necessity. For although an incumbrance prior to registration will generally have been a mortgage of the land, whilst unregistered, in the usual form (*y*), and although registered charges subsequent to registration are very commonly accompanied by an unregistered mortgage of the proprietor's estate, it appears that, when the registered incumbrance or charge has been cleared off the register, any outstanding legal estate will

u, Above, pp. 1181, 1182.

s, Above, pp. 1182—1189.

(*t*) Above, p. 1166.

u Above, pp. 1174—1177.

(*r*) Above, pp. 1174—1177.

(*y*) Above, pp. 1175, 1177.

be extinguished upon the completion by registration of the transfer to the purchaser (*z*). And as such transfer, when registered, appears to confer on the purchaser (in the case of freeholds) an unincumbered fee simple by a new title depending on an act of sovereignty and not upon the extent of the vendor's own estate (*a*), there does not seem to be the same necessity as exists in the case of unregistered land for taking care that any outstanding legal estate shall be assured direct to the purchaser (*b*). Where the vendor is registered with an absolute title, but there are registered incumbrances prior to first registration, whereof the proprietorship has not been registered, we have seen (*c*) that the title must be investigated in the same manner as if the land were not registered, and the purchaser must obtain satisfactory proof that the incumbrances have been discharged. In such case the proper course (*d*) appears to be to require that the persons in whom the incumbrances are presently vested shall execute a separate deed of reconveyance to the *purchaser*, as is usual on sales of unregistered land (*e*), and that the vendor shall concur therein to direct and confirm such assurance. It is thought that in this conveyance the incumbrancers would be bound to give the usual covenant that they have done no act to incumber (*f*), but that, in the absence of special stipulation, the vendor could not be required to covenant for title (*g*).

Where the land sold is registered with a qualified Sale of land
registered

(*c*) Above, pp. 1175, 1181.

(*a*) Above, p. 1182, and *note*.

(*b*) Above, p. 622.

(*e*) Above, p. 1177.

(*d*) This course is advised because the execution of such a deed affords the best evidence of the discharge of the incumbrance; but so long as the required proof is obtained that the charge has

been paid off, there is no *necessity* for a reconveyance of the legal estate which may be left to be extinguished by the operation of the transfer to the purchaser: above, pp. 1175, 1181.

(*e*) Above, p. 622.

(*f*) Above, pp. 655, 658.

(*g*) Above, p. 1169.

with a qualified title.

title (*h*), the purchaser, under an open contract, has not only to satisfy himself that he will obtain a transfer of the estate free from registered incumbrances and things declared not to be incumbrances (*i*), but he must also investigate, in the same manner as if the land were not registered, the title to the right or interest appearing by the register to be excepted from the effect of registration (*k*); and he must obtain a proper assurance of that right or interest to himself from the person or persons in whom the same is ascertained to be presently vested. It is thought that such assurance should be made by a deed separate from the instrument of transfer, and that the vendor should concur therein to direct and confirm the conveyance thereby made, and to enter into the appropriate covenants for title (*l*).

Sale of land registered with a possessory title only.

Where land registered with a possessory title (*m*) is sold under an open contract, the purchaser, besides seeing that he will obtain the estate purchased clear of registered incumbrances (*n*) and things declared not to be incumbrances (*o*), must ascertain, by investigation of the title in the same manner as if the land were not registered, whether any right or interest adverse to or in derogation of the title of the first registered proprietor was subsisting or capable of arising at the time of the registration of such proprietor (*p*). He must, in fact, consider whether the first registered proprietor was entitled to be registered with an absolute title. If any such right or interest were then subsisting or capable of arising, the subsequent title thereto must be deduced in the same manner as if the land were not

h) Above, p. 1168 and n. (*g*).

i) Above, pp. 1173, 1194.

k) See stat. 38 & 39 Vict. c. 87, ss. 30, 31, 35; Land Transfer Rules (1903), 140—142.

l) Above, p. 1169.

m) Above, p. 1168, n. (*r*).

n) Above, pp. 1174—1178.

o) Above, p. 1166, and n. (*o*).

p) See stat. 38 & 39 Vict. c. 87, ss. 30, 32, 35; Land Transfer Rules (1903), 140, 142.

registered; and the same must be duly assured to the purchaser by the person or persons, in whom it is ascertained to be presently vested. Such assurance should, it is thought, be made by deed separate from the instrument of transfer, and the vendor should concur therein to direct and confirm the conveyance to the purchaser and to give the appropriate covenants for title (*q*). If it be ascertained that no such right or interest as aforesaid was at the time of first registration subsisting or capable of arising, there would not appear to be any strict necessity for the purchaser to take an assurance of the vendor's estate as well as to obtain the due execution of his statutory power of transfer; for such assurance could vest in the purchaser no larger estate than, if so large an estate as the statutory transfer (*r*). At the same time a vendor registered with a possessory title has only a limited and not an unqualified power of transfer; he is not absolutely empowered to dispose of the whole estate in the registered land (*r*). It appears proper, therefore, to supplement the transfer by a grant or an assignment of the fee simple or term contracted to be sold; and the more so as the vendor is bound to give covenants for title as against estates or interests excluded from the effect of registration (*s*). And for the reasons given below, it is thought that this assurance of the vendor's estate should be contained in a deed separate from the instrument of transfer, the appropriate covenants for title being included therein.

With respect to the question of inserting in an instrument of transfer any other provisions than those

As to inserting in an instrument of

(*q*) Above, pp. 1169, 1173, 1194.

(*r*) See above, pp. 1181, 1182.

If the whole fee simple be *in* the vendor, the purchaser will obtain the like estate on registration of the transfer to himself, but by a

new statutory title; and if there be any outstanding estate or right adverse to the vendor's interest, it would not pass by any direct conveyance that he could make.

(*s*) Above, p. 1169.

transfer
matters
extraneous
to the
transferee's
registration.

necessary to exercise the statutory *power* of transfer (*t*), the conveyancer must recollect that as a rule all documents (including such instruments) on which any entry in the register is founded are to be retained in the Land Registry, and are not to be taken away therefrom except under a written order of the registrar or an order of the Court (*u*). And the principle of the system of registration of title introduced by the Land Transfer Acts appears to be that the entries in the register, when made, supersede the instruments on which the entries are founded (*x*). Office copies of such documents may be issued (*y*), but are not made evidence by the Acts or Rules (*z*). It is thought, therefore, that an instrument of transfer should as a rule be confined to such provisions as will confer on the transferee the right to have the required entry in the register made in his favour (*a*). If a contract for the sale of registered land contain any other stipulations than those necessary to secure the purchaser's registration as proprietor of the land, effect should be given to those stipulations by a separate deed which the purchaser can retain in his own custody, ready to be produced whenever necessary in support of his rights, without any application being made to the registrar or the Court. Thus, where the vendor of regis-

(*t*) Above, pp. 1182, 1185.

(*u*) Land Transfer Rules (1903), 119.

(*v*) See above, pp. 1165, n. (*c*), 1181.

(*y*) Land Transfer Rules (1903), 294.

(*z*) By stat. 38 & 39 Vict. c. 87, s. 80, any land certificate or certificate of charge shall be *prima facie* evidence of the several matters therein contained; and by the Land Transfer Rules (1903), 260, where an office copy of an entry in the register, or of the filed plan of the land, or of any document filed in the registry is annexed to any certificate it

shall, for the purposes of sect. 80 of the Act of 1875, be deemed to be contained in the certificate itself. Copies of the instrument of transfer are not annexed to the land certificate issued on the completion of the transfer, but certificates of charge now contain an office copy of the instrument of charge. See Land Transfer Rules (1903), 258, 259.

(*a*) A conveyance of the transferor's estate, where made *ex abundanti cautela*, and not strictly necessary, may be considered as ancillary to this end: above, pp. 1185, 1200.

tered land gives any covenants for title or against incumbrances (*b*), such covenants should be contained in a separate deed, and not in the instrument of transfer (*c*).

The form of instrument of transfer given in the Land Transfer Rules, 1903 (*d*), does not show to whom or by whom the consideration money is paid, nor does it contain any receipt for the payment made. Care should be taken in adapting this form to practical use to amend it in these particulars, especially as regards the receipt for payment of the purchase money, in default of which the purchaser would not be justified in paying the money to the vendor's solicitor producing the instrument duly executed, except by virtue of an express authority in that behalf properly conferred (*e*).

Receipt clause should be inserted in the instrument of transfer.

The Land Transfer Act, 1875 (*f*), provides that, previously to registering any disposition of land, it shall be the duty of the registrar to ascertain that all such stamp duties have been satisfied as would be payable if the disposition to be registered had been an unregistered disposition. And by the Land Transfer Rules (1903), No. 123, when an application or instrument capable of registration is made or executed for the sole purpose of carrying out on the register a transaction already effected by a deed or other instrument not on the register, the Inland Revenue stamp on the transaction shall be affixed to or impressed on the last mentioned deed or instrument, and the registered instrument shall bear no stamp duty; provided that the stamped instrument shall before the completion of the registration be produced to an officer of the registry, to show that all duty payable in respect of the transaction has been

Stamps on sale of registered land.

(*b*) Above, pp. 1169, 1202, 1203.

(*c*) Above, p. 1204.

(*d*) First Schedule, Form 20.

(*e*) See above, pp. 740—744.

(*f*) Stat. 38 & 39 Vict. c. 57, s. 83 (7).

Land
Registry
fee stamps.

paid. If therefore a sale of registered land is to be completed by an instrument of transfer alone (*g*) duly registered, such instrument must be stamped according to the law regulating the stamping of conveyances on sale of unregistered land (*h*). But in those cases where the instrument of transfer is accompanied by an unregistered assurance to the purchaser of the land sold (*i*), that assurance must be duly stamped as a conveyance on sale, and the instrument of transfer will then require no stamp. Besides the proper Inland Revenue stamps, instruments or applications delivered for registration at the Land Registry must bear the proper Land Registry fee stamps (*k*).

Purchaser of
registered
land entitled
to delivery
of the title
deeds.

It is thought that, on the sale of registered land, the purchaser is equally entitled, as in the case of unregistered land (*l*), to have all documents of title, which relate solely to the purchased land, delivered over to him on completion. And this appears to be the case, notwithstanding that the vendor be registered with an absolute title, so that the purchaser could not call for any abstract or for production of these documents (*m*). So also documents of this kind dealing with registered incumbrances prior to first registration, which are discharged on completion of the sale, should be handed over to the purchaser, whether the proprietorship of such incumbrances were registered or not (*n*). But the purchaser's right to require any statutory acknowledgment or undertaking with respect to any document of title, which may lawfully be withheld from him, appears to be

(*g*) Above, p. 1200.

(*h*) Above, pp. 696—712.

(*i*) Above, pp. 1200—1203.

(*l*) See Land Transfer Rules (1903), 111; Land Transfer Fee Order, 1903, r. 3.

(*u*) Above, p. 680.

(*n*) Above, p. 1166. It may be

mentioned here that, on the completion of any application for registration of title, all documents of title that have been used in support of the application are returned to the applicant; Land Transfer Rules (1908), I. 47.

(*m*) Above, pp. 1174—1177.

limited to such documents as are necessary to make a good title according to the contract, this being the rule applicable on the sale of unregistered land (*o*).

Here it may be observed that, owing to the limited effect given to the first registration of land with a qualified or possessory title (*p*), such registration can never form a good root of title (*q*); so that, as a rule, a purchaser under an open contract of land so registered will always be entitled to call for the title prior to registration. But where registered leasehold land (*r*) is sold as such under an open contract, it appears that the purchaser has no more right to call for the lessor's title than if the land were not registered (*s*); so that, if the land be registered with a good leasehold title (*t*), the purchaser will be precluded from inquiring into any other title than that registered (*u*). It appears however that any registered leasehold land, which is held by underlease, must be so described in the contract, or the purchaser will be entitled to object to the title (*x*). And it should be particularly noted that a registered transfer of leasehold land vests in the transferee the possession of the land comprised in the registered lease for all the leasehold estate therein described, but *subject* (amongst other things (*y*)) to all implied and express covenants, obligations and liabilities incident to such leasehold estate (*z*). And such covenants, obligations

Registration with qualified or possessory title does not make a good root of title.

Sale of registered leaseholds.

Where held by underlease.

(*o*) Above, p. 684.

(*p*) Above, p. 1168, nn. (*q*, *r*).

(*q*) Above, p. 106; see 2nd Rep. (1911) of Land Transfer Commissioners, §§ 56, 61.

(*r*) See above, p. 383, and n. (*t*).

(*s*) Above, pp. 99—101, 1166—1168.

(*t*) Above, p. 1168, n. (*q*).

(*u*) Above, p. 1166.

(*x*) Above, pp. 101, n. (*i*), 350.

(*y*) These are (1) registered incumbrances; (2) unless the contrary is expressed on the register,

such liabilities, rights and interests as affect the leasehold estate and are by the Acts declared not to be incumbrances in the case of registered freehold land; and (3) estates, rights or interests exempted from the effect of registration with a qualified, good leasehold or possessory title; see above, pp. 1165, n. (*o*), 1166, 1168, nn. (*q*, *r*), 1170—1173, 1181, 1182, 1194, and next note.

(*z*) Stat. 38 & 39 Vict. c. 87, ss. 13, 35, 38; Land Transfer Rules (1903), 55—59, 140—142.

Purchaser
must require
an abstract
and pro-
duction of
the lease.

Unusually
onerous
covenants.

Registered
leaseholds
subject to a
restriction on
alienation
without the
lessor's
licence.

and liabilities do not appear on the register, except only that the existence of a prohibition against alienation without licence should be found noted thereon. A purchaser of registered leasehold land must therefore call for an abstract and production of the lease under which the land sold is held, in order to ascertain to what covenants, obligations and liabilities he will become subject. And it is submitted that he is necessarily entitled to demand such abstract and production under an open contract, notwithstanding the terms of sect. 16 of the Land Transfer Act, 1897, above quoted (*a*); for he does not require the same as evidence of the vendor's title, but as evidence of matters adverse thereto and excluded from the effect of registration; and he would certainly be entitled to such evidence of these matters if the land were not registered. At the same time, a purchaser of registered leasehold land by private contract is advised to place his rights in this respect beyond doubt by special stipulation. If the covenants or conditions in the lease should be unusually onerous or stringent, it is thought that the purchaser would be entitled, under an open contract, to object to the title, as upon a sale of unregistered land (*b*). And generally, in all other respects, save as to proof of title and assurance by registered transfer, contracts for sale of registered leasehold land are governed by the same rules as are applicable in the case of unregistered leaseholds (*c*). By the Land Transfer Rules, 1903, No. 62, on the registration of any leasehold land held under a lease containing a prohibition against alienation without licence, all estates, rights, interests, powers and remedies under such lease, arising upon or by reason of any alienation without licence, shall be expressly exempted from the effect of regis-

(*a*) Above, p. 1166.

(*b*) Above, pp. 350—352.

(*c*) Above, pp. 350 *sq.*

tration. On the sale of any such leasehold land therefore, the lessor's licence to the transfer to the purchaser must be obtained as in the case of unregistered land (*d*).

By the Land Transfer Act, 1875 (*e*), on any transfer of leasehold land thereunder, there shall be implied, in the absence of any entry in the register negating such implication, a covenant by the transferor that, notwithstanding anything by him done, omitted or knowingly suffered, the rent has been paid and the lessee's covenants and conditions in the lease observed and performed up to the date of the transfer, and a covenant by the transferee to pay the rent and perform and observe such covenants and conditions in future, and to indemnify the transferor against non-payment of the rent or breach of such covenants or conditions (*f*).

Covenants implied on transfer of registered leaseholds.

Land, which is the subject of a settlement, may be registered under the proprietorship either of the tenant for life having the power of sale given by the Settled Land Acts (*g*), or of the trustees of the settlement having the power of sale or holding the land on trust for sale, or where there is an overriding power of appointment of the fee simple, of the persons in whom that power is vested (*h*): but in each case there must also be entered on the register such restrictions or inhibitions as may be prescribed by the rules or may be expedient for the protection of the rights of the persons beneficially interested in the land (*i*). Thus where

Purchase of registered land which is settled.

(*d*) Above, pp. 359 *sq.*

(*e*) Stat. 38 & 39 Vict. c. 87, s. 39; see Land Transfer Rules (1903), 138, 139, of which the latter modifies and extends this enactment in a manner appropriate to the transfer of part of the land comprised in the lease.

(*f*) Above, pp. 652, 656.

(*g*) Above, pp. 300 *sq.*

(*h*) Stats. 38 & 39 Vict. c. 87, s. 68; 60 & 61 Vict. c. 65, s. 6 (1).

(*i*) Stat. 60 & 61 Vict. c. 65, s. 6 (2); see Land Transfer Rules (1903), 78—81, 128, 129, 186—190.

the tenant for life is registered as proprietor, restrictions are entered prohibiting transfers except under an order of the registrar or by way of sale whereon the purchase money is to be paid to the trustees of the settlement (*k*); and where the trustees are registered as the proprietors, restrictions are entered on transfers, unless made under such an order or with the consent of the tenant for life (*l*). And proper restrictions on registered charges are also entered. But in all these cases the person or persons, in whose proprietorship the land is registered, can, subject only to the restrictions entered on the register, exercise all the powers of disposition given by the Land Transfer Acts to the registered proprietor of registered land (*m*). If therefore any such person or persons be registered with an absolute title, a purchaser of the land so registered is only concerned (apart from the matter of registered incumbrances and things declared not to be incumbrances (*n*)) to see that the vendor's proprietorship is registered as claimed (*o*), and that the restrictions entered on the register shall be duly observed (*p*). He is not concerned to see whether the vendor has any power of sale under the settlement or by virtue of the Settled Land Acts; nor, indeed, is he entitled to call for production of the instrument of settlement, or for any information or evidence as to its contents (*q*). But where the tenant for life or the trustees has or have been registered with a possessory title only subsequently to the date of the settlement, it will be incumbent on a purchaser from him or them to ascertain by investigation of the title in the same manner as if the land were not registered,

(*k*) Land Transfer Rules 1903, First Schedule, Forms 6, 7.

(*l*) *Ibid.* Form 8. See above, pp. 291 *sq.*

(*m*) See *stat.* 38 & 39 Vict. c. 87, ss. 22 *sq.*, 29 *sq.*; 60 & 61 Vict. c. 65, ss. 6 (8), 8.

(*n*) Above, pp. 1166, 1167, 1171 *sq.*

(*o*) Above, p. 1173.

(*p*) Above, p. 1178.

(*q*) Stat. 60 & 61 Vict. c. 65, s. 6 (6); and *sect.* 16 (1), above, pp. 1166, 1170.

that the vendor or vendors had at the time of first registration such a power of sale as would have entitled him or them to be registered as proprietor or proprietors of the land with an *absolute* title (*r*). If he be satisfied as to this, he may accept the title and take the statutory transfer without any other assurance (*s*). Otherwise he must of course require such further assurance as may be necessary in the circumstances (*t*). Where land has been first registered with a possessory title, and a settlement thereof has been subsequently made, and the tenant for life or trustees registered, pursuant to a transfer to the uses of the settlement (*u*), as proprietor or proprietors, a purchaser from him or them under an open contract will of course have to investigate and, if necessary, get in the title prior to first registration (*t*), but as regards the estate comprised in the settlement he will only have to see that he obtains the statutory transfer free from registered incumbrances and things declared not to be incumbrances (*x*); and he will not be entitled to call for production of the settlement (*y*), and is not concerned to see whether the vendor or vendors has or have any power of sale thereunder. The same principles are of course applicable where settled land is purchased from persons registered as the proprietors thereof in virtue of their having an over-riding power of appointment (*z*).

Where registered land is sold subject to registered charges created *subsequently* to first registration (*u*), which it is not proposed to pay off, it appears that, if the vendor be registered with an absolute title, or if the

Purchase of registered land subject to registered charges or incumbrances.

(*r*) Above, pp. 1202, 1203.

(*s*) Above, p. 1203.

(*t*) Above, pp. 1170—1173, 1194, 1202, 1203.

(*u*) See Land Transfer Rules (1903), 128.

(*v*) Above, pp. 1166—1168, 1173.

(*y*) Above, pp. 1165 *sq.*, 1169.

(*z*) Above, p. 1209.

(*a*) Above, p. 1177.

title prior to first registration with a possessory title were perfect (*b*), the purchaser will, on registration of the transfer to himself, obtain the *legal* estate in the land sold, subject to the registered charges, but free from all other estates or interests, save only those declared not to be incumbrances (*c*). And this is equally the case, although the chargees hold unregistered mortgages of the vendor's estate (*d*). The purchaser will therefore be in a more favourable position in some respects than the purchaser of an equity of redemption of unregistered land (*e*). Thus he will not take subject to *all* equitable interests created previously to the sale (*e*). Nor is he liable, as it appears, to be adversely affected by tacking (*f*); for the estate conferred upon him by the registration of the transfer to himself will only be subject to *registered* charges; and it is thought that any unregistered further charges in favour of any registered chargee will be extinguished by the effect of the registered transfer, notwithstanding that he had notice of them (*g*). As regards the risk of consolidation (*h*), it is provided by the Land Transfer Act, 1897 (*i*), that nothing contained in any charge shall affect any registered dealing with land or a charge in respect of which the charge is not expressly registered or protected in accordance with the Act of 1875 and that Act. This is not a very lucid enactment. But it appears that, where a registered charge reserves the right of consolidation, such right cannot be exercised to the prejudice of a subsequent registered transferee or chargee of the land, unless the right were noted in the register (*k*). Where the right of consolidation has been reserved in

Tacking.

Consolidation
of securities.

(*b*) Above, pp. 1202, 1203.

(*c*) Above, p. 1181.

(*d*) Above, p. 1182.

(*e*) Above, p. 476.

(*f*) Above, p. 477.

(*g*) Above, pp. 1181, 1182, 1189.

(*h*) Above, p. 476.

(*i*) Stat. 60 & 61 Vict. c. 65, s. 94.

(*k*) See Land Transfer Rules (1903), 169.

a mortgage of other land than that comprised in a registered charge (whether the other land be registered or not), and affected or has come to affect (*l*) the land comprised in the registered charge, the case does not come within the terms of the enactment quoted. But here the creditor's right of consolidation appears to be an equity arising independently of the registered charge; and it seems that, unless the right were noted in the register against the land comprised in the registered charge (*m*), it would be extinguished by the effect of a registered transfer for value from the registered proprietor of that land (*n*). The result appears to be that a purchaser of registered land, subject to registered charges created subsequently to first registration, need only regard the charges registered and any right of consolidation entered on the register. But the purchase of registered land to be transferred subject to registered incumbrances *prior* to first registration is very different. In such case the incumbrances will remain paramount to the estates conferred by the registered transfer; and it does not appear that the registration of the transfer would extinguish any legal estate outstanding in any one of the incumbrancers (*o*). The purchaser therefore would get no more than an equity of redemption, and he would be exposed to some, though not to all, of the risks to which he would be liable if the land were not registered (*p*). Thus where the proprietorship of such incumbrances has not been registered, it seems that the owners of them would not be deprived of any rights of consolidation or tacking which they might exercise if the land were not registered. And it is questionable whether the owners of such incumbrances are in any worse position in these respects, where they have pro-

l See above, p. 476 and n. c.

(*m*) See last note but one.

n See above, p. 1182.

o Above, p. 1181.

(*p*) Above, p. 476.

cured themselves to be registered as proprietors of the incumbrances; although it may be contended that they have thereby rendered themselves liable to the same law as governs the proprietors of registered charges subsequent to first registration (*q*).

Registered
incorporeal
heredita-
ments.

The title to any advowson, rent, tithes inappropriate or other incorporeal hereditaments of freehold tenure, may be registered under the Land Transfer Acts (*r*). And, as it is expressly enacted that all hereditaments, corporeal or incorporeal, shall be deemed land within the meaning of these Acts (*s*), it appears that the registered proprietor of any incorporeal hereditament so registered has the same statutory powers of disposition as the registered proprietor of registered land (*t*). But nothing in the Land Transfer Act, 1897, shall render compulsory the registration of the title to an incorporeal hereditament (*u*). As we have seen (*x*), quit rents, crown rents, and other rents having their origin in tenure, tithe rentcharge, and payments in lieu thereof or of tithes, profits à *prendre*, and easements, are amongst the matters declared by the Acts not to be incumbrances, and are thus exempted from the effect of first registration and of the registered transfer of registered land (*y*). These incorporeal hereditaments, therefore, if not registered (*z*), remain subject to the general law (*a*) as regards their sale and assurance, notwith-

(*q*) See above, p. 1176 and n. (*m*).

(*r*) Stats. 38 & 39 Vict. c. 87, s. 82; 60 & 61 Vict. c. 65, First Schedule; Land Transfer Rules (1903), 71—73.

(*s*) Stat. 60 & 61 Vict. c. 65, s. 24 (1).

(*t*) Above, pp. 1165, n. (*e*), 1182.

(*u*) Stat. 60 & 61 Vict. c. 65, s. 24 (1); see sect. 20 (1, 2); above, pp. 380, 381.

(*x*) Above, p. 1166, n. (*o*).

(*y*) Above, p. 1168, nn. (*p*, *q*, *r*).

(*z*) As above mentioned (p. 1167), notice of such liabilities, rights or interests as are declared not to be incumbrances may be entered on the register; but it is not provided that such notice shall have any particular effect, and it appears to have no effect beyond giving notice of what is entered.

(*a*) Above, pp. 433 *sq.*

standing that they arise within a district where registration is compulsory (*b*). But the sale and assurance of any registered incorporeal hereditament is governed by the same rules as apply in the case of registered land (*c*).

Rentcharges or annuities issuing out of registered land are not amongst the things declared not to be incumbrances (*d*). They appear to be incumbrances on the land (*e*), and if already existing when the land is registered, they may be entered in the register as incumbrances prior to first registration, either without their proprietorship being registered or not (*f*). When so entered, they will be protected, as being registered incumbrances, from the effect of first registration and registered transfers of the land (*g*). If the proprietorship of such rentcharges be not registered, they will remain subject to the general law as regards their sale and assurance (*h*). But if their owners procure themselves to be registered as the proprietors thereof, it appears that the rentcharges will thenceforth be assimilated to, and transferable in the same manner as, rentcharges created by registered charge subsequently to registration of the land charged (*i*). Under the Land Transfer Act, 1897 (*k*), rentcharges or annuities to issue out of registered land may be created by way of registered charge (*l*). And the registered proprietors

Rentcharges
issuing out
of registered
land.

(*b*) See above, p. 380.

(*c*) Above, pp. 1166 *sq.*

(*d*) Above, p. 1166, n. (*a*).

(*e*) See above, p. 176, n. (*g*).

(*f*) Land Transfer Rules (1908), I. 43; (1903), 175—181; above, pp. 1168, 1174, 1181.

(*g*) Above, p. 1074.

(*h*) Above, pp. 433 *sq.*

(*i*) See above, p. 1176 & n. (*m*).

(*k*) Stat. 60 & 61 Vict. c. 65, s. 9 (3); Land Transfer Rules (1903), 160.

(*l*) In such case the grantee

of the rentcharge appears to have the rights and remedies given by the Land Transfer Acts to the registered proprietor of a registered charge, so far as the same are applicable to the recovery of an annuity (see stats. 38 & 39 Vict. c. 87, ss. 23—27; 60 & 61 Vict. c. 65, s. 9 (3)); and in addition, the remedies conferred by sect. 44 of the Conveyancing Act, 1881 (stat. 44 & 45 Vict. c. 41).

of such charges have the same powers of disposition by way of registered transfer and sub-charge thereof as are given in case of registered charges to secure payment of a principal sum of money (*m*). Besides this, the Act of 1875 (*n*) provided for the registration of any fee farm grant or other grant reserving rents or services to which the fee simple estate in any freehold land about to be registered or registered might be subject, with such particulars of the land or services, and the conditions annexed to the non-payment or non-performance or otherwise of such rent and services as might be prescribed; and enacted that any record so made should be conclusive evidence as to the rents, services and conditions so recorded, and such fee simple estate as last aforesaid should be subject thereto accordingly. Where a transfer of registered land in consideration of a rentcharge is registered under this enactment, the transferee is to be registered as the proprietor of the land, the rentcharge entered in the charges register as an incumbrance thereon (*o*), and the transferor registered as the proprietor of the rentcharge under a separate title (*p*). It is obvious that rentcharges or annuities, to issue out of land already registered, should be created either by registered charge or by way of registered transfer subject to a rentcharge, so that the title thereto can be duly registered; as, if granted by unregistered disposition, they will be liable to be extinguished by the effect of a registered transfer for value of the land on which they are charged (*q*).

Rights appen-
dant and
appurtenant.

Under the Land Transfer Act, 1875, first registration as proprietor of freehold land or a registered trans-

(*m*) Stats. 38 & 39 Vict. c. 87, s. 40; 60 & 61 Vict. c. 65, s. 22 (6, c); Land Transfer Rules (1903), 178-181.

(*n*) Stat. 38 & 39 Vict. c. 87,

s. 82.

(*o*) Land Transfer Rules (1903), 130.

(*p*) Ibid r. 151.

q. Above, pp. 1181, 1182.

fer of such land vests in the proprietor or transferee all rights, privileges and appurtenances belonging or appertaining thereto (*r.*); and first registration as proprietor of leasehold land or a registered transfer of such land vests in the proprietor or transferee all implied or expressed rights, privileges and appurtenances attached to the leasehold estate described in the registered lease (*s.*). It does not appear that these provisions vest in the proprietor or transferee any rights which are not *legally* appendant or appurtenant to the land (*t.*). But the Land Transfer Rules (1903) provide that the registration of a person as proprietor of land shall vest in him, together with the land, all rights, privileges and appurtenances appertaining or reputed to appertain to the land or any part thereof or at the time of registration demised, occupied or enjoyed therewith or reputed or known as part or parcel of or appurtenant to the land or any part thereof (*u.*). It seems questionable, however, whether this rule is authorised by the rule-making powers conferred by the Land Transfer Acts (*x.*); as the rule purports to vest in the registered proprietor more extensive legal rights than are conferred on him by the operative words of the Act. It is also a question whether a registered transfer of registered land is a conveyance within the meaning of sect. 6 of the Conveyancing Act of 1881 (*y.*), so as to operate by virtue of that Act to convey to the transferee all privileges or advantages enjoyed with the land at the time of conveyance; for this enactment applies only to conveyances by deed (*z.*), and although all instruments

(*r.*) Stat. 38 & 39 Vict. c. 87, ss. 7—9, 30—33.

(*s.*) Sects. 13, 35, 38; Land Transfer Rules (1903), 55—57, 59, 140—142.

(*t.*) See above, p. 639.

(*u.*) Rule 254.

(*x.*) See Stats. 38 & 39 Vict. c. 87, s. 111; 60 & 61 Vict. c. 65, s. 22 (6).

(*y.*) Stat. 44 & 45 Vict. c. 41; see above, p. 639.

(*z.*) Sect. 2 (v).

of transfer are required to be executed as deeds (*a*), they derive their conveyancing effect from the Land Transfer Act, 1875 (*b*), and not from the form prescribed for the instrument of transfer. For this reason, amongst others, it is desirable to insert in every instrument of transfer proper words of conveyance of the transferor's estate (*c*); as in that case sect. 6 of the Conveyancing Act of 1881 will certainly apply (*d*). When the vendor of registered land is entitled to modify (*e*) the effect of these statutory provisions, he must be careful to insert the words necessary for his protection in the instrument of transfer.

Creation of leases and of easements or other rights over registered land.

The statutory *powers* (*f*) of disposition given by the Land Transfer Acts to the registered proprietor of registered land do not extend beyond the transfer of the land registered, or any part thereof, and the creation of registered charges thereon (*g*); they are not exercisable for making a lease of the land for any term of years (*h*), or for the grant of any *profit à prendre*, easement, or similar right over the land registered. If, therefore, a sale be made of any such right to be created anew over registered land, effect can only be given to the contract (except in the case mentioned above (*i*)) by the same method of assurance as if the land were not registered. In such case the purchaser will have the same right of investigating the vendor's title to the

(*a*) Above, p. 1199.

(*b*) Above, notes (*r*, *s*), p. 1217.

(*c*) See above, pp. 1185 and n. (*h*), 1200—1204 and n. (*z*).

(*d*) See above, p. 638.

(*e*) See above, pp. 639 *sq.*

(*f*) Above, p. 1182.

(*g*) Stats. 38 & 39 Vict. c. 87, ss. 22, 29; above, p. 1215, n. (*k*).

(*h*) It should be noted that, since leases for years of registered land can only be created to take effect out of the *estate* of the

registered proprietor and not by virtue of his statutory *power* of disposition, it is necessary, on every occasion on which his title to grant such a lease is by special stipulation to be investigated, that all his unregistered dispositions (if any) of the land shall be abstracted and produced; see above, pp. 100, 101; cf. pp. 1181, 1189 *sq.*

(*i*) Above, p. 1217.

land, over which the right sold is to be granted, as if the land were not registered (*h*); subject, however, to the rule already mentioned (*l*), that where an absolute title is vested in the vendor by Act of Parliament, as on registration under the Land Transfer Acts with absolute title (*m*), he cannot be required to give any other or earlier proof of his title. And the purchaser will be entitled to call for an abstract and production of all unregistered assurances dealing with the land in question off the register; since the vendor cannot, by any conveyance of the right sold, extinguish any estate or interest so created (*n*). The purchaser will also have the same right to covenants for title (*o*), and he should make the same searches (*p*) as if the land were not registered (*q*). Where such a right is sold by itself, it must necessarily be granted by an unregistered deed; but the purchaser may as well procure notice of the right to be entered on the register (*r*). Where a contract for the sale of some registered land includes an agreement for the sale of some particular easement, or other such right as aforesaid, to be granted over other land of the vendor's, it is thought, according to the principle asserted above (*s*), that the grant of the easement or right should be made by a deed separate from the instrument of transfer; but notice of the right may be registered against the land affected thereby (*r*).

Searches.

The Land Transfer Acts make no special provision for the reservation of any easement or similar right on the transfer of registered land. Such a reservation

Reservation of an easement or other right over registered land.

(*h*) Above, p. 434.

(*l*) Above, p. 100 and n. (*d*).

(*m*) Above, p. 1168, n. (*p*).

(*n*) Cf. above, pp. 1181, 1182, 1218, n. (*h*).

(*o*) Above, pp. 652 *sq.*

(*p*) Above, pp. 580 *sq.*

(*q*) It does not appear that a

purchaser of such a right to be created anew over registered land is a purchaser of registered land within the meaning of sect. 16 of the Land Transfer Act, 1897 (above, pp. 1166, 1214).

(*r*) See above, p. 1214, n. (*z*).

(*s*) Above, p. 1204.

must therefore be effected by the like assurance as in the case of unregistered land (*t*); that is to say, by way of grant from the transferee, who must execute the deed containing it (*u*). It appears that a reservation of this kind may well be made in an instrument of transfer of registered land if apt words be employed and the transferee execute the instrument of transfer (*x*). But as the reservation of an easement or other such incorporeal hereditament as above mentioned (*y*) is not a provision necessarily giving rise to an entry in the register (*z*), and as it is desirable that the person making the reservation shall have evidence of his title thereto in his own possession (*a*), it is thought that, where a stipulation is made on the sale of registered land for any reservation in the vendor's favour (*b*), the reservation should be made by unregistered assurance to be executed in duplicate (so that the vendor may retain the counterpart), and should also be made in the instrument of transfer, which the purchaser should execute (*c*). The vendor may then procure notice of the right created by the reservation to be registered against the land (*d*).

(*t*) See 1 Davidson, *Prec. Conv.* 96, 97, 4th ed.; 75, 76, 5th ed.

(*u*) *Doe d. Douglas v. Lock*, 2 A. & E. 705, 743; *Hickham v. Hawker*, 7 M. & W. 63, 76; *Durham, &c. Ry. Co. v. Walker*, 2 Q. B. 940, 967; *Pennell v. Mill*, 3 C. B. 625, 637, 638; *Proud v. Bates*, 31 L. J. Ch. 406, 411; *May v. Belleville*, 1905, 2 Ch. 605.

(*x*) Above, pp. 1185, n. (*h*), 1199. It may be observed here that in order to reserve (*i.e.*, by way of grant as above mentioned) an easement or other incorporeal hereditament in fee, it seems to be necessary, and it is certainly proper, to use the appropriate words of inheritance; see Litt.

s. 1; Co. Litt. 9 a, b, 307 a; 2 Black. Comm. 35; *Hevlins v. Shippam*, 5 B. & C. 221, 228, 229. It does not appear to be sufficient to reserve such a right to the transferor and the registered proprietor for the time being of the land, to which the right is to be annexed. See, however, 21 L. Q. R. 199 *sq.*, 259 *sq.*, 264 *sq.*

(*y*) Above, p. 1218.

(*z*) Above, p. 1204.

(*a*) See above, p. 1204.

(*b*) Above, pp. 641—643.

(*c*) Above, n. (*x*).

(*d*) Above, p. 1214, n. (*z*).

We have seen (*e*) that conditions restricting the use of any registered land must be registered in order to be completely effective; as, unless so registered, they are liable to be extinguished by the effect of a registered transfer of the land (*f*). But the powers of disposition given by the Land Transfer Acts do not extend to making such conditions (*g*), which must therefore be created in the same manner as if the land were not registered (*h*). And it has been held that the mere registration under these Acts of restrictive conditions (*i*) does not of itself annex them to the land, against which they are registered, as a burthen thereon, unless by some covenant or agreement made independently of the registration the land has been duly made subject to the liability so sought to be imposed (*k*). Where any registered land is sold together with the benefit of a stipulation for restricting in future the use of some adjoining land, it is thought that the purchaser has the same right of investigating the title to the adjoining land, and should make the same searches, as in the case of an easement to be created thereover (*l*); and the restrictive conditions must necessarily be created by deed of covenant separate from the instrument of transfer. Where registered land is sold subject to restrictive conditions to be newly created thereover, they should be made by separate deed of covenant to be executed by the purchaser, and should be mentioned in the instrument of transfer as well (*m*); and the transferee must execute the instrument of transfer (*n*). In either case the restrictive conditions must be duly registered (*o*),

Restrictive conditions affecting registered land.

Searches

(*e*) Above, p. 1194.

(*f*) Above, p. 1182.

(*g*) Above, p. 1218.

(*h*) Above, pp. 493, 494.

(*i*) Above, p. 1194.

(*k*) *Willé v. St. John*, 1910,

(*l*) Above, p. 1219.

(*m*) Land Transfer Rules (1903), 153.

(*n*) Above, p. 1199.

(*o*) Land Transfer Rules (1903), 153, 223.

1 Ch. 84, 325.

for which purpose production of the land certificate is required (*p*).

Removal from the register of restrictive conditions.

By the Land Transfer Act, 1875 (*q*), any restrictive condition registered thereunder as annexed to registered land may be modified or discharged by order of the Court, on proof, to the satisfaction of the Court, that such modification will be beneficial to the persons *principally interested* in the enforcement of such condition (*r*). But it appears that such conditions may also be released, wholly or partially, by *all* the persons entitled to the benefit thereof (*s*); and that the entries in the register may be removed or modified accordingly (*t*).

Joint registered proprietors.

When any land is registered in the name of two or more persons as joint proprietors thereof, it appears that they have together the same powers of disposition as a single registered proprietor (*u*), subject to any restriction thereon, which may be entered in the register (*x*). They must therefore all execute any instrument of transfer or charge which they may make.

Corporation registered as proprietor.

Where an application for registration as proprietor of land or a charge is made by a corporation, evidence is required of its incorporation and of its power to deal with the land or charge (*y*); and if the corporation be in any way restrained from alienation (*z*), a restric-

(*p*) Above, p. 1169, n. (*u*).

(*q*) Stat. 38 & 39 Vict. c. 87, s. 84.

(*r*) See *Ground Rent Development Co. v. West*, 1902, 1 Ch. 674.

(*s*) See above, pp. 497, 1025.

(*t*) Land Transfer Rules (1903), 17.

(*u*) Stat. 38 & 39 Vict. c. 87, s. 69; 60 & 61 Vict. c. 65, s. 14 (1) and First Schedule.

(*x*) A restriction may be entered on dispositions by joint proprietors, after their number has been reduced below some specified limit; stat. 38 & 39 Vict. c. 87, s. 83 (3); 60 & 61 Vict. c. 65, First Schedule; Land Transfer Rules (1903), 224, 225.

(*y*) Land Transfer Rules (1903), 256.

(*z*) Above, pp. 946 *sq.*

tion, protecting such restraint, is to be entered in the register (*a*). And a transfer of land to a corporation (*b*) is not to be registered until the registrar is satisfied that it is in accordance with the law of mortmain (*c*); and where it shall appear to the registrar that a right of pre-emption, or reverter, or restrictive condition, or a restriction on alienation by the transferee, or any other like right or restriction exists, or may arise, he shall enter notice of any such right or conditions, or a restriction or inhibition protecting any such right, condition, or restriction on alienation or otherwise, in such manner and form as he shall think fit (*d*). An intending purchaser or chargee of land registered in the name of a corporation should therefore find any restrictions which may exist on the corporation's powers of alienation (*e*), properly noted in the register; and, of course he cannot take the transfer or charge unless the restrictions can be complied with or removed (*f*). But as it is enacted in the Land Transfer Act, 1897 (*g*), that where a registered disposition would if unregistered be absolutely void, the register shall be rectified, and the person suffering loss by the rectification shall be entitled to the indemnity provided by the Act (*h*), it appears that any one proposing to take a registered transfer or charge from a corporation must satisfy himself with respect to the incorporation and the powers of alienation possessed by the corporation in the same manner as if the land were not registered (*i*). For if he should omit to do this, and the transfer or charge were void as being *ultra vires* (*k*), and the necessary restriction had not been entered in the register, he

Transfer to a corporation.

(*a*) Land Transfer Rules (1908), I. 41.

(*b*) See L. T. R. (1903), 144.

(*c*) Above, p. 943.

(*d*) L. T. R. (1903), 146.

(*e*) Above, pp. 946 *sq.*

(*f*) Above, p. 1178.

(*g*) Stat. 60 & 61 Vict. c. 65, s. 7 (2).

(*h*) See sect. 7 (1); stat. 38 & 39 Vict. c. 87, s. 95.

(*i*) Above, p. 957.

(*k*) Above, pp. 946—949.

might be ejected from the land or lose his charge thereon; although it appears that he would be entitled to the indemnity. And he must of course satisfy himself that the instrument of transfer or charge is executed in such manner as will bind the corporation (*l*).

Charity lands
registered.

Lands, which are vested in trustees for any charitable uses, or in the official trustee of charity lands, and for the sale of which the consent of the Charity Commissioners (*m*) or Board of Education (*n*) is by statute required, may be registered in the proprietorship of such trustees or official trustee, subject to a restriction on alienation without the consent of the Commissioners or the Board, as the case may be (*o*). But land, which is held for charitable uses and can be sold without the consent of the Charity Commissioners or the Board (*p*), may be registered in the proprietorship of the trustees thereof having the power of sale (*q*) without any restriction (*r*). Where application for registration as proprietors of land or a charge is made by any body of trustees, in whom, as such, property from time to time vests (*s*), evidence is required of the provisions under which the property so vests and of their power to deal with the land or charge (*t*); and if their estate be subject to a restraint on alienation, a restriction protecting the same is to be entered (*u*). A transfer of land for charitable uses (*x*) shall not be registered until the registrar is satisfied that it is in accordance with the law relating to charitable uses (*y*); and the like notice,

(*l*) Above, p. 959.

(*m*) Above, pp. 446, 459 *sq.*

(*n*) Above, p. 465.

(*o*) Land Transfer Rules (1903), 83, 84, 86.

(*p*) Above, p. 460 & n. (*e*).

(*q*) Above, pp. 382, n. (*f*), 1209.

(*r*) Land Transfer Rules (1903), 85.

(*s*) Above, p. 464.

(*t*) Land Transfer Rules (1903), 256.

(*u*) L. T. R. (1908), I. 41.

(*x*) See L. T. R. (1903), 145.

(*y*) Above, pp. 445 *sq.*; see p. 447 & n. (*f*).

restriction or inhibition is to be entered, where necessary, as on a transfer to a corporation (*z*). Owing to the above mentioned provision of the Land Transfer Act, 1897, as to registered dispositions, which if unregistered would be absolutely void (*a*), it appears that, where an intending purchaser or chargee of land registered in the name of joint proprietors or a sole proprietor, without any restriction, has notice that it is held upon any charitable trust, he should satisfy himself that it can lawfully be disposed of without the consent of the Charity Commissioners, or Board of Education, in the same manner as if the land were not registered (*b*).

Here it may be observed that the above mentioned enactment of the Land Transfer Act, 1897 (*c*), providing that the register shall be rectified where a registered disposition would if unregistered be absolutely void, appears to be very far-reaching in its effect, and to introduce into dealings with registered land an element of uncertainty against which a purchaser has no protection. Thus a purchaser of land from a vendor registered as proprietor with an absolute title is precluded from inquiring into the earlier title; he must accept the present entries in the register as conclusive evidence (*d*). If however the vendor had been so registered under a transfer which if unregistered would have been void (as from a corporation in excess of its powers or from trustees prohibited from selling without the Charity Commissioners' consent (*e*)), it appears that those entitled by virtue of the nullity of such transfer would have the right to have the register rectified; that is to say, they might insist that the vendor was not the

Effect of a registered disposition which if unregistered would be void.

(*z*) Land Transfer Rules (1903), 146, quoted above, p. 1223.

(*a*) Above, p. 1223.

(*b*) Above, p. 460 & n. (*c*).

(*c*) Above, p. 1223.

(*d*) Above, p. 1166.

(*e*) Above, pp. 1223, 1224.

lawful registered proprietor of land, and procure the removal of his name from the register. But if it can be so maintained that the vendor is not the registered proprietor of the land, it appears to follow that he cannot validly exercise the powers of disposition given to the registered proprietor, so as to extinguish outstanding interests (*f*). The transfer to the purchaser therefore, though duly registered, would appear not to vest in him an indefeasible estate in fee simple (*g*), but to give him only an estate voidable at the instance of those entitled to the rectification of the register. It is true that the purchaser would be entitled to an indemnity under the Land Transfer Act, 1897 (*h*); but, as was recognised in founding the jurisdiction to decree specific performance (*i*), pecuniary damages are not an adequate compensation for being deprived of land purchased with the expectation of an indefeasible title. Other instances of registered dispositions, which if unregistered would be absolutely void, are forged transfers (*k*), and transfers void for mistake (*l*) or for non-compliance with the statute regulating the assurance of land to charitable uses (*m*). It should be noted that, in the above respects, a person taking or deriving title under a *registered transfer of a registered charge* made by a registered proprietor, whose title was acquired under a void disposition, appears to stand in a more favourable position; as it is enacted in the Land Transfer Act, 1897 (*n*), that a registered transferee for value of a charge and his successors in title shall not be affected by any irregularity or invalidity in the original charge itself, of which the transferee was not aware

Protection of persons claiming under a transfer of a charge made by a proprietor entitled under a void disposition.

(*f*) See Vaughan Williams, L. J., *A.-G. v. Odell*, 1906, 2 Ch. 47, 75.

(*g*) Above, p. 1181.

(*h*) Above, p. 1223 & n. (*h*).

(*i*) Above, p. 1093.

(*k*) Above, p. 838.

(*l*) Above, p. 753, n. (*m*).

(*m*) Above, pp. 445 *sq.*, 447, 1224.

(*n*) Stat. 60 & 61 Vict. c. 65, First Schedule, amending stat. 38 & 39 Vict. c. 87, s. 40.

when it was transferred to him. But the like protection is not accorded to the original chargee himself, nor to persons claiming under a void transfer of a valid charge. Thus it has been decided that in the case of a forged transfer of a charge, the name of the person misled by the forgery must be removed from the register, and that he is not entitled to the indemnity provided by the Act (*o*).

The title may be registered to an individual share in land, or to mines and minerals severed from the surface, or to cellars, flats, or chambers, in the same manner as to the entirety (*p*). But we have seen (*q*) that nothing in the Land Transfer Act, 1897, shall render compulsory the registration of the title to an undivided share in land, or to mines and minerals apart from the surface. This exemption, however, is not extended to cellars, flats, chambers, or similar hereditaments (*r*).

Copyholds cannot be registered as such under the Land Transfer Acts; nor customary freeholds in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of the tenant (*s*). But freeholds intermixed with and indistinguishable from copyholds or customary freeholds may be so registered: though in such case notice is to be entered on the register of the facts relating to the tenure of the land, and the tenure of that portion of the land, which is not freehold, will remain unaffected

(*o*) *A.-G. v. Odell*, 1906, 2 Ch. 47.

(*p*) Stats. 38 & 39 Vict. c. 87, s. 82; 60 & 61 Vict. c. 65, s. 14 (1); Land Transfer Rules (1903), 71—77.

(*q*) Above, p. 382; see also pp. 388—392.

(*r*) See stat. 60 & 61 Vict. c. 65, s. 24; above, p. 382.

(*s*) Stat. 38 & 39 Vict. c. 87, s. 2. But if at any time land is

found to have been registered with absolute or qualified title contrary to the provisions of this section, the registration shall not be annulled, but shall be deemed an error not capable of rectification under the Principal Act, and any person suffering loss thereby shall be indemnified accordingly; stat 60 & 61 Vict. c. 65, First Schedule.

by the registration (*t*). We have seen that nothing in the Land Transfer Act, 1897, is to render compulsory the registration of the title to freeholds intermixed with and indistinguishable from lands of other tenure, or to corporeal hereditaments *parcel* of a manor and included in a sale of a manor as such (*u*). The title to a manor or a seignory may be registered (*x*).

Manor ;
seignory.

Purchase of
registered
land from a
mortgagee
exercising his
power of sale.

The purchase of registered land from a mortgagee exercising his power of sale is a matter demanding special notice. A mortgagee of registered land may occupy one of four different positions. First, his mortgage may be a registered incumbrance, prior to first registration with an absolute title, whereof the proprietorship is not registered (*y*). Secondly, the mortgagor may have registered, after the mortgage, with a possessory title, but the mortgagee may not have been registered as proprietor of the incumbrance (*z*). Thirdly, the mortgage may be a registered incumbrance, prior to first registration with an absolute or a possessory title, whereof the proprietorship *is* registered (*a*). And fourthly, the mortgage may have been made subsequently to the registration of the land (*b*).

Purchase
from an
incum-
brancer,
prior to first
registration
with absolute

In the first of these cases all that has to be ascertained from the register is that the incumbrance is duly registered, as alleged, so as to remain paramount to the effect of first registration with an absolute title and of

(*t*) Stat. 38 & 39 Vict. c. 87, s. 67; Land Transfer Rules (1903), 87.

(*u*) Above, p. 382, and n. (*q*).

(*x*) Stat. 38 & 39 Vict. c. 87, s. 82; Land Transfer Rules (1903), 71; above, p. 1214.

(*y*) Above, p. 1174.

(*z*) In such case the mortgage will have been an estate, right, or interest adverse to or in derogation of the mortgagor's title and so exempted from the extin-

guishing effect of the first registration of such title; see above, pp. 1168, n. (*r*), 1181, 1182, 1202, 1203. If such registration took place before the 1st Jan. 1909, the mortgage would not have been entered on the register as an incumbrance; but it will have been so entered if the registration took place on or after that date: above, p. 1174, and n. (*y*).

(*a*) Above, pp. 1175, 1176.

(*b*) Above, pp. 1177, 1178.

registered transfers of the land (*c*). This done, the investigation of the title will be conducted in the same manner exactly as if the land were not registered (*d*); the same points being particularly attended to as on a purchase of unregistered land from a mortgagee exercising his power of sale (*e*). But the assurance of the land sold to the purchaser and the completion of the contract present some difficulty, owing to the fact that the land is registered in the proprietorship of the mortgagor, or his successor in estate, who presumably is no party to the contract. We will suppose that the purchaser is buying under an open contract and that the land sold is situated in a district where registration on sale is compulsory (*f*). As the vendor is selling an estate paramount to the title of the registered proprietor and entirely unaffected by the registration, it is at least questionable whether he is a vendor of registered land within the meaning of sect. 16 of the Land Transfer Act, 1897 (*g*): but it is submitted that in the case of freehold land he is, since the land sold is in fact already registered, and the vendor cannot, by conveyance under his power of sale, confer a title under which an application can be made for registration as *first* proprietor of the land (*h*). If this suggestion be correct, the vendor will be bound, at the purchaser's request and *at his own expense, and notwithstanding any stipulation to the contrary*, either to procure the registration of himself as proprietor of the land, or of the incumbrance, under which he is selling, or to procure a transfer from the registered proprietor to the purchaser (*i*). And if the sale be not

title, not registered as proprietor of the incumbrance.

(*c*) Above, pp. 1168, n. (*p*), 1181.

(*d*) Above, p. 1177.

(*e*) Above, pp. 335 *sq.*

(*f*) Above, pp. 380 *sq.*

(*g*) Above, pp. 1166—1169; see *Re Voss & Saunders' Contract*, 1911, 1 Ch. 42, deciding that a mort-

gagee of leaseholds by demise (prior to first registration with possessory title) selling *his sub-term* does not sell registered land.

(*h*) See stat. 60 & 61 Vict. c. 65, s. 20 (1, 2': above, pp. 380, 381.

(*i*) Above, pp. 1168, 1169.

regulated by the above enactment, it is thought that, under an open contract, the vendor would nevertheless be bound to procure the purchaser's registration as proprietor of the land: otherwise, although it appears that the purchaser would obtain the legal estate (*k*), there would remain outstanding the registered proprietor's interest with the powers of disposition incident thereto (*l*). But in this event the purchaser would have to bear the expense of such registration, except that of any acts to be done for this purpose by the vendor himself or any other necessary party, such as the registered proprietor of the land (*m*). The sale should, it is thought, be completed by an unregistered assurance of the estate sold to the purchaser, in which the vendor should covenant against incumbrances (*n*), followed by the registration of the purchaser as proprietor of the land: but the purchaser should not pay the price until he has acquired a clear right to be registered as proprietor and is satisfied that his registration will relate back to the time of payment (*o*). The purchaser can only obtain this right in three ways. Either the registered proprietor of the land must at the vendor's request execute a registered transfer to the purchaser; in which case the purchaser must of course ascertain that the proprietor's title is unincumbered, or that all incumbrancers concur in the transfer (*p*). Or the vendor must procure himself to be registered as proprietor of the incumbrance, under which he is selling, when he will acquire the statutory power to transfer the land

k. Because the vendor could not confer a title under which an application for *first* registration could be made: see above, p. 1230, n. (*h*); Cozens-Hardy, L. J., *Capital and Counties Bank, Ltd. v. Rhodes*, 1903, 1 Ch. 631, 656, 657.

l. Under the general law of sale, it is the duty of the vendor of an unincumbered estate in fee

simple to get in all outstanding interests, whether paramount to his own or not: see above, pp. 41, 164—168, 512, 610, n. (*e*), 612, 1066, 1067.

m. Above, pp. 384, 385, 733—735, 1189, n. (*s*).

n. Above, pp. 1201, 1204.

o. Above, pp. 1183—1189.

p. Above, pp. 1173, 1177.

sold in exercise of his power of sale (*q*), and will be enabled to exercise the same in the purchaser's favour. Or proceedings must be taken under the Land Transfer Rules (1903), No. 151 (*r*), to procure the purchaser's registration as proprietor of the land. It is thought that the purchaser is entitled, in one way or another, to have the land sold transferred into his own registered proprietorship; and he should insist on obtaining this. If the vendor procure a transfer from the registered proprietor and all other necessary parties, or procure himself to be registered as proprietor of the incumbrance and then transfer to the purchaser, the purchase money may be paid, after a priority notice has been obtained in favour of the transfer to the purchaser, on the execution of the unregistered assurance and the instrument of transfer to the purchaser and on delivery of the land certificate (*s*), or, where the vendor has been registered as proprietor of the incumbrance, of the certificate of incumbrance (*t*), with the priority notice endorsed

(*q*) Stats. 38 & 39 Vict. c. 87, s. 27; 60 & 61 Vict. c. 65, ss. 9 (1), 22 (6, c); Land Transfer Rules (1903), 175, 176; above, p. 1176 & n. (*m*); below, p. 1234. It does not appear that in this case the vendor would have the right to procure himself to be registered as proprietor of the land.

(*r*) Providing that, when the power of disposing of registered land has, by the operation of any statute or statutory power or by order of Court or by paramount title, become vested in some person other than the registered proprietor (as, for instance, in the case of a deed poll executed under sect. 77 of the Lands Clauses Consolidation Act, 1845, or of a declaration vesting an estate contained in or made under or by virtue of any statute, or of a sale by a mortgagee with a title paramount to the title registered) and the registered proprietor refuses to execute a transfer, or his

execution of a transfer cannot be obtained, or can only be obtained after undue delay or expense, the registrar may, after due notice under these rules to each proprietor, and on production of the land certificate, and such evidence as he may deem sufficient, make such entry in or correction of the register as under the circumstances he shall deem fit. And by r. 152, on a disposition by a mortgagee or other person under or by virtue of any estate, right, interest or power not affected by the registration, or entered as an incumbrance prior to registration, the registrar may dispense with the production of the land certificate; see above, p. 1169, n. (*u*).

(*s*) And also of the certificate of charge, if any chargee concur in the transfer.

(*t*) Stat. 60 & 61 Vict. c. 65, s. 8 (4); above, p. 1173, n. (*p*).

Searches.

thereon (*u*). But if application be made under rule 151 to have the purchaser's name entered as proprietor of the land, it is thought that he should not part with the purchase money until the registrar has directed the required entry to be made; for until then the purchaser has no absolute right to be so registered, and he cannot be assured that the application will be granted (*x*). The question, what searches should be made, also depends on the manner in which the purchaser's registration is to be effected. If he is to obtain a transfer from the registered proprietor of the land and all other necessary parties (the incumbrance being expunged from the register (*y*)), or from the vendor when registered as proprietor of the incumbrance under which the sale is made (*z*), it appears that the effect of the transfer, when registered, will relieve him from the necessity of making any searches other than such as are advisable on the purchase of registered land (*a*). But if application for the purchaser's registration is to be made under rule 151 (*b*), the same searches should be made as upon the sale of unregistered land (*c*); for the purchaser's claim to be so registered must be proved to the registrar's satisfaction (*b*).

Purchase from a mortgagee selling under a mortgage prior to registration with a possessory title.

Where the mortgage was made prior to the mortgagor's registration as first proprietor with a possessory title, the same principles apply, but the circumstances are different. The title must be investigated and searches made in the same manner as if the land

(*u*) Above, pp. 1182 *sq.*, 1188 and n. (*q*), 1189.

(*x*) Consider the terms of r. 151, above, p. 1231, n. (*r*).

(*y*) Above, p. 1174.

(*z*) It is thought that such a transfer would have the like vesting and extinguishing effect and would give as good a title as a transfer by the registered pro-

prietor of the land: but the Act does not expressly so provide; see stats. 38 & 39 Vict. c. 87, s. 27; 60 & 61 Vict. c. 65, ss. 8 (4), 9 (1, 2); above, p. 1176, n. (*m*).

(*a*) Above, pp. 1194—1197.

(*b*) Above, p. 1231, n. (*r*).

(*c*) Above, pp. 580 *sq.*

were not registered (*d*). But it is doubtful whether, in the case of freehold land, the vendor is a vendor of registered land within the above mentioned enactment; for, although the land has been already registered with a possessory title, it seems that he can confer a title under which application may be made for *first* registration with an *absolute* title (*e*). It appears, however, that for this reason, if the land sold be situate in a district where registration is compulsory, the purchaser would not obtain the legal estate unless or until he were registered as the proprietor thereof (*f*). So that he would in any case be entitled to require the vendor to procure, at his expense, his registration as proprietor of the land (*g*). It appears that this can be effected either by a transfer from the registered proprietor and his registered incumbrances, if any, or by the vendor procuring himself to be registered as proprietor of his incumbrance and then exercising the statutory power of transfer on sale, which he will thus acquire (*h*), or by an application under rule 151 (*i*). The sale should, it is thought, be completed by an unregistered assurance of the land to the purchaser, in which the vendor should covenant against incumbrances (*k*), followed by the purchaser's registration as proprietor of the land to be obtained in one of the above mentioned ways; and the purchase money should be paid according to the mode of completion adopted (*l*).

Where the vendor is the registered proprietor of a registered incumbrance prior to first registration with an *absolute* title (*m*), it appears to lie in the purchaser's

Purchase
from an in-
cumbrancer,
prior to first

(*d*) Above, pp. 580 *sq.*, 1173, 1194, 1202, 1203.

(*e*) Above, pp. 1229, 1230; see above, p. 1229, n. (*g*), as to leasehold land mortgaged before registration by demise.

(*f*) Above, pp. 381, 382.

(*g*) Above, pp. 384, 385, 1230 and n. (*k*).

(*h*) Above, pp. 1231 and n. (*q*), 1232 and n. (*z*).

(*i*) Above, p. 1231 and n. (*r*).

(*k*) Above, pp. 1202—1205.

(*l*) Above, pp. 1183—1189.

(*m*) Above, p. 1175.

registration,
registered as
proprietor of
the incum-
brance.

option whether he will investigate the title off the register or not (*n*); but it seems that he must do so, in the same manner as if the land were not registered (*o*), as he cannot ascertain from the entries in the register whether the power of sale has become exercisable or not (*p*). The vendor, being registered as the proprietor of the incumbrance under which he is selling, is enabled by the Land Transfer Acts (*q*) to give effect to his power of sale, when exercisable, by transferring the land, on which he has the registered incumbrance, in the same manner as if he were the registered proprietor thereof. What the purchaser has to ascertain, therefore, by investigation of the title and inspection of the register is that the vendor is the registered proprietor of a registered first charge prior to registration with an *absolute* title, that he has the power of sale, and that the power of sale has become exercisable (*r*). The purchaser need make no searches other than those advisable on the purchase of registered land (*s*). Completion should, it is thought, be effected by a separate assurance of the land, in which the vendor should covenant against incumbrances (*t*), together with a registered transfer from the vendor in exercise of his statutory power in that behalf; and the purchase money may be paid as above mentioned in discussing the proper mode of completing an open contract to purchase registered land (*u*). There will be no need to produce the land certificate to procure the purchaser's registration, but production of the certificate of incumbrance will be required (*x*).

(*n*) Above, p. 1174.

(*o*) Above, pp. 335 *sq.*

(*p*) See Brickdale & Sheldon's Land Transfer Acts, 634, 2nd ed.

(*q*) Above, pp. 1231, n. (*q*), 1232, n. (*z*). By stat. 60 & 61 Vict. c. 65, s. 9 (1), a transfer of land made by the registered proprietor of a registered charge with power of sale shall operate as a conveyance in professed

exercise of the power of sale conferred by the Conveyancing Act of 1881; see above, p. 337 & n. (*p*).

(*r*) Above, pp. 335 *sq.*

(*s*) Above, pp. 1194—1196.

(*t*) Above, pp. 1204, 1205.

(*u*) Above, pp. 1182—1189.

(*x*) Stat. 60 & 61 Vict. c. 65, s. 8 (4); above, p. 1173, n. (*p*).

Where the vendor is registered as the proprietor of an incumbrance prior to first registration with a *possessory* title, completion should be effected in the same way: but it is absolutely essential to investigate the title in the same manner and to make the same searches as if the proprietorship of the incumbrance were not registered and the purchaser were buying from the registered proprietor of the land (*y*). For in such case it appears that a registered transfer from the vendor in exercise of his statutory power to transfer on a sale under his power of sale would not have any greater vesting or extinguishing effect than a transfer from the registered proprietor of the land (*z*); that is, it would confer an estate subject to the same estates, rights or interests as would remain outstanding after a registered transfer from a proprietor registered with possessory title (*a*). Where the registered title to the land is qualified, and the purchaser buys from a mortgagee under a mortgage prior to first registration, the same principles apply as if the title to the land were possessory; but as regards estates or interests, which are paramount to the registered title to the land, the purchaser has only to ascertain that the vendor can convey the land to him free from the estate, right or interest, appearing by the register to be excepted from the effect of the first registration of that title (*b*).

Where the land is registered with a possessory title only.

Where the registered title to the land is qualified.

The sale of land under the power of sale conferred by a registered charge which has been created subsequently to the registration of the land, is similar to the last case, except that the circumstances admit of interests paramount to the charge; as where the title registered is absolute, but there are incumbrances prior to registration, or where the title registered is qualified

Purchase from a chargee subsequent to registration.

(*y*) See above, pp. 1176 & n. (*m*), 1177, 1194, 1202.

(*z*) See above, pp. 1231 & n. (*y*), 1232, n. (*z*).

(*a*) Above, pp. 1174, n. (*r*), 1181, 1182, 1203.

(*b*) See above, pp. 1168 & n. (*q*), 1174, n. (*y*), 1176 and n. (*m*), 1181, 1182, 1194, 1202, 1203, 1232, 1233.

or possessory. If there should be such interests outstanding, the title thereto must of course be proved, and they must be got in or discharged as above mentioned in case of the sale of registered land by the registered proprietor (*c*). Apart from such interests, as where the title registered is absolute and free from incumbrances prior to registration, it appears that the purchaser, under an open contract, would have no right to investigate the title off the register (*d*), or need to make other searches than those advisable on the purchase of registered land (*e*); but he would have to ascertain from the register that the vendor was the registered proprietor of a registered first charge with power of sale (*f*), and that at the time of registration of the *charge* the proprietor of the *land* was registered with an absolute title; and he would have to satisfy himself that the power of sale had become exercisable (*g*). To make sure of this, he should inspect the instrument of charge, which is filed in the register, but of which a copy would be found in the certificate of charge (*h*). As regards the estate which the vendor has power under the charge to sell, the sale would be completed by a registered transfer of the land sold from the vendor to the purchaser; the vendor having a statutory authority, as registered proprietor of a registered charge, to transfer the land sold under his power of sale in the same manner as if he were the registered proprietor of the land (*i*). The purchase

(*c*) Above, pp. 1174, 1194, 1202.

(*d*) Above, pp. 1166, 1167, 1181.

(*e*) Above, pp. 1194—1196.

(*f*) The Land Transfer Act, 1897, s. 9 (2), applied to registered charges the power of sale and other powers given by the Conveyancing Act of 1881 (stat. 44 & 45 Vict. c. 41, ss. 19—24, except sect. 21 (1, 4)), to mortgagees by deed; so that, as the instrument of charge is a deed,

the chargee will have all these powers in the absence of stipulation to the contrary. See stats. 38 & 39 Vict. c. 87, ss. 22 *sq.*, 27; 60 & 61 Vict. c. 65, s. 9; Land Transfer Rules (1903), 159; above, pp. 1203, 1234, n. (*g*).

(*g*) Above, pp. 335 *sq.*

(*h*) Above, p. 1204, n. (*z*).

(*i*) Stat. 38 & 39 Vict. c. 87, s. 27; see above, pp. 1232, n. (*z*), 1234, n. (*g*).

money may be paid on taking the precautions explained above (*k*); and production is required of the certificate of charge alone, and not of the land certificate (*l*). It is thought that the vendor could be required to give the usual mortgagee's covenant against incumbrances (*m*); although, where an absolute title had been registered, the purchaser under an open contract would not be entitled to any covenants for title (*n*). This being so, it would appear more convenient to take the covenant against incumbrances by a separate deed, which the purchaser could retain in his own possession (*o*); and in this deed an assurance to the purchaser of all the vendor's estate and interest (*p*) in the land sold may also be inserted.

Particular difficulties arise where a sale of registered land is to be followed by an immediate mortgage thereof, the mortgagee advancing part of the purchase money (*q*): but to explain these it is necessary to say a few words about the form of a mortgage of registered land.

Sale and mortgage of registered land.

The statutory charges on registered land, which were introduced by the Land Transfer Acts (*r*), appear to confer on the chargee fairly adequate remedies for the recovery of the mortgage debt and interest by suing the mortgagor personally (*s*), by exercise of the power of sale (*t*) and by foreclosure (*u*): but they are deficient

Remedies conferred by registered charges on registered land.

(*k*) Above, pp. 1182—1189.

(*l*) Stat. 60 & 61 Vict. c. 65, s. 8 (4); above, p. 1173, u. (*p*).

(*m*) Above, pp. 655, 1234.

(*n*) Above, p. 1169.

(*o*) See above, pp. 1263, 1205.

(*p*) See above, p. 1200.

(*q*) Above, p. 624.

(*r*) Stats. 38 & 39 Vict. c. 87, ss. 22—28; 60 & 61 Vict. c. 65, s. 9.

(*s*) Stat. 38 & 39 Vict. c. 87, s. 23. As an office copy of the

instrument of charge is now contained in the certificate of charge, and when so contained is made *prima facie* evidence of the instrument (above, p. 1204, n. (*z*)), the chargee has in his own possession sufficient evidence for enforcing the covenant to pay implied in the charge.

(*t*) Above, p. 1236 and nn. (*f*, *i*).

(*u*) Stat. 38 & 39 Vict. c. 87, s. 26, enabling the chargee to en-

in respect of the mortgagee's remedy by entry into possession. Where the registered proprietor of the land, who created the registered charge, had himself the legal estate, the registered proprietor of the registered charge appears to have a *legal interest* in the land charged in the nature of a lien thereon for the principal money and interest charged (*x*) and a *legal* right of entry into possession or receipt of the rents and profits of the land charged (*y*): but he obtains no *estate* in the land (*z*), and the Land Transfer Acts do not expressly give to a registered charge the same or the like effect as they give to a registered transfer of the land (*a*). The result is that, although the chargee's rights of lien and entry appear to be clearly paramount to all subsequent registered or unregistered dispositions of the legal estate in the land (*b*), it is not absolutely certain

force a foreclosure or sale of the land charged in the same manner in which he might enforce the same if the land had been transferred to him by way of mortgage. By the Land Transfer Rules (1903), 164, the chargee, on obtaining an order for foreclosure absolute, is entitled to be registered as proprietor of the land, subject to prior charges, if any. And it appears that he will thus obtain the like estate as if the land had been transferred to him for value by the person registered as proprietor thereof at the time of registration of the charge; see *Weymouth v. Davis*, 1908, 2 Ch. 169.

(*x*) Stat. 38 & 39 Vict. c. 87, s. 22. It is immaterial that no such interest was previously known to the English law of land; the authority of Parliament is supreme; and all Courts, of law as well as of equity, are bound to give effect to the charge; see *Lord Advocate v. Moray*, 1905, A. C. 531, 539.

(*y*) Stat. 38 & 39 Vict. c. 87, s. 25.

(*z*) See *Capital and Counties Bank, Ltd. v. Rhodes*, 1903, 1 Ch. 631, 650, 657.

(*a*) Above, pp 1165, n. (*c*), 1168, nn. (*p*, *q*, *r*), 1176, n. (*m*), 1181.

(*b*) This opinion has been expressed that a registered charge "does not convey any legal estate so as to enable the mortgagee to maintain an action for the recovery of the land"; Wolstenholme's Forms and Precedents, 249, n. (*a*), 6th ed., citing *Allen v. Woods*, 68 L. T. 143. That case however merely decides that, on ejection by one claiming under an *equitable* title, the person entitled to the legal estate must be a party to the action. But, as above maintained (n. (*x*)), the chargee has a *legal* right of entry; so this case has no application. And with great respect to the opinion of the learned author cited, it is not necessary to have the legal estate in land in order to maintain successfully an action to recover possession thereof. We have seen that by the common law a man wrongfully dispossessed

whether they take priority over previous unregistered dispositions of the legal estate, or if they do, whether the right of entry can be asserted without making the person entitled to the legal estate a party to the action (*c*). The question is this:—Since the Acts do not expressly attribute any extinguishing effect to a registered charge, can the registered proprietor of registered land, after he has parted with the legal estate therein by unregistered disposition (*d*), confer by a registered charge a *legal* interest by way of lien and a *legal* right of entry, taking priority over the outstanding legal estate in the land? It is thought that the provision of the Land Transfer Act, 1875 (*e*), which permits of the disposition of registered land by unregistered assurance, *subject to the maintenance of the estate and right of the registered proprietor*, points to the preservation to the registered proprietor of his statutory power to create registered charges, notwithstanding that he has parted with the legal estate in the land; and that, on an exercise in such circumstances of the statutory power of charging, the chargee would still obtain a *legal* interest by way of lien and a *legal* right of entry taking precedence of the outstanding unregistered legal estate in the land. This appears to be the opinion of Lord Justice Cozens-Hardy (*f*). And this opinion may be further supported by the contention that the owner

of land was divested of all estate therein, and left with a mere right of entry or even of action; above, p. 858. But he could nevertheless well maintain an action to recover possession against all persons whomsoever for the time being in occupation of the land; see Wms. Real Prop. 17 & n. (*n*), 65, 21st ed., and authorities there cited.

(*c*) See previous note. If the chargee were to sue the mortgagor to get possession of the land charged, it is thought that

the latter would be precluded from asserting that the legal estate was outstanding in some third person; *Doe d. Ogile v. Vickers*, 4 A. & E. 782; *Doe d. Huett v. Clifton*, ib. 809, 813; *Doe d. Levy v. Horne*, 3 Q. B. 757, 760, 766.

(*d*) Above, p. 1180.

(*e*) Stat. 38 & 39 Viet. c. 87, s. 49; above, p. 1181 and n. (*l*).

(*f*) *Capital and Counties Bank, Ltd. v. Rhodes*, 1903, 1 Ch. 631, 656.

of the unregistered legal estate, having allowed the registered proprietor to remain on the register as ostensible owner of the land, with all the registered proprietor's powers of disposition, is estopped from asserting his own rights in derogation of any interest or right created by any exercise of those powers (*g*). There is however a more serious objection to the position of a registered chargee of registered land. Where the mortgaged land is let at the time of registration of the charge, the chargee, not acquiring any estate in the land (*h*), does not become an assignee of the mortgagor's legal estate in reversion on the leases. It follows that, although the chargee may enter into receipt of the rents and profits of the mortgaged land (*i*), it is at least extremely doubtful whether he can sue the tenants on the lessee's covenants in the leases, or enforce any proviso for re-entry therein contained (*j*). Besides this,

(*g*) Above, p. 1189, n. (*x*).

(*h*) Above, p. 1238.

(*i*) Above, p. 1238.

(*j*) Note that in *Capital and Counties Bank, Ltd. v. Rhodes*, 1903, 1 Ch. 631, 647, 652, the mortgagee's right of enforcing the proviso for re-entry was certainly treated by the C. A. as dependent on his having the legal estate in fee. It is thought that the chargee, having a mere lien on the reversion, could not be held to be an assignee of part of the reversion and so entitled to enforce the covenants and right of re-entry; see Co. Litt. 215 a; *Wright v. Burroughes*, 3 C. B. 685. But he might possibly be considered (when in possession) to be "a person entitled, subject to the term, to the income of the land leased," and to be enabled, as such, to enforce the lessee's covenants and the conditions of re-entry by virtue of sect. 10 of the Conveyancing Act of 1881 (stat. 44 & 45 Vict. c. 41), as regards leases made

after that year; see *Turner v. Walsh*, 1909, 2 K. B. 484; above, pp. 403, 404; *sed quere*, for he is liable to account for the rents. With respect to the chargee's right, on entry into possession, to enforce the lessee's covenants and the conditions in a lease granted by the mortgagor, after the charge, under sect. 18 of the Conveyancing Act of 1881 (stat. 44 & 45 Vict. c. 41), the opinion has been expressed that he can do so; 2 Key & Elph. Prec. Conv. 919, 8th ed.; 280, 9th ed., citing *Municipal, &c. Building Socy. v. Smith*, 22 Q. B. D. 70. That case certainly decided that, when a lease is so granted by the mortgagor after an ordinary mortgage in fee of unregistered land, the mortgagee entering into possession can enforce the lessee's covenants and the conditions in the lease. But the ground of the decision was that, in such circumstances, the lease took effect under the statutory power out of the mortgagor's legal estate in the

when a registered chargee enforces his right of entry (*k*), he is not in the position of a mortgagee in fee of unregistered land, who simply takes possession of his own fee simple, subject only to the mortgagor's equity of redemption, which will be altogether extinguished when the mortgagor has held possession for twelve years without acknowledgment of the mortgagor's title or right to redemption (*l*). The registered chargee, who has entered into possession, has still no definite estate in the land; though he seems to have an interest analogous to that of a tenant by *elect*. He has no right, on entry into possession, to be registered as proprietor of the land; the mortgagor therefore remains the registered proprietor and can still exercise all the registered proprietor's powers of transfer or charge. And when the chargee has been in possession for twelve years without acknowledgment of the mortgagor's title, he does not obtain *ipso facto* the full ownership of the land: but he must first apply to the Court for an order for rectification of the register by entry of his name as proprietor of the land. And it does not appear that he can claim such an order as his undoubted right; the granting thereof appears to be in the judicial discretion of the Court, which is to be exercised "subject to any estates or rights acquired by registration for valuable consideration in pursuance of the Land Transfer Acts" (*m*). It seems, therefore, that persons claiming under registered transfers for value or charges made by the mortgagor

land, and the mortgagee had therefore the legal reversion. With great respect to the editors of the treatise above cited, it is submitted that it is far from clear that a registered chargee of registered land, having no estate at all in the land and no part of the reversionary estate expectant on such a lease, could successfully maintain an action to enforce the

lessee's covenants or the conditions therein contained.

(*k*) Above, p. 1238.

(*l*) Stats. 3 & 4 Will. IV. c. 27, ss. 28, 34; 37 & 38 Vict. c. 57, ss. 7, 9; *Kinsman v. Rouse*, 17 Ch. D. 104; *Forster v. Patterson*, ib. 132.

(*m*) See stats. 38 & 39 Vict. c. 87, s. 95; 60 & 61 Vict. c. 65, s. 12.

subsequently to the chargee's entry into possession might be allowed to have a further right of redemption, notwithstanding that the chargee had held possession for twelve years. And in any case the chargee would be saddled with the burden of proof that he is entitled to have the register rectified as he desires; and he would have to pay the costs of his application out of his own pocket. For these reasons it appears that an intending mortgagee of registered land cannot be advised to rest satisfied with a registered charge alone (*n*). He must in some way obtain such a security as will vest in him the mortgagor's estate; or he may be powerless against tenants under leases prior to the charge in case he be obliged to enter into possession, and he will be at a great disadvantage in the matter of acquiring an absolute title by twelve years' possession.

Mortgage of
registered
land by
transfer.

There are two ways of making such a mortgage; and each of them is much more disadvantageous to the mortgagor than an ordinary mortgage of unregistered land. The first, which is that most favourable to the mortgagee, is for the mortgagee to take a registered transfer of the land offered as security, and to be entered in the register as proprietor of the land, the mortgagor's right of redemption being secured to him by an unregistered deed (*o*). The mortgagor must, of

(*n*) An exception may be made where the proposed loan is so much below the value of the land that it is practically impossible that the amount secured would not be realised by a forced sale. It is thought that trustees proposing to invest trust money on mortgage of registered land could not be advised to rest satisfied with a registered charge alone, where they intend to advance the full amount of that proportion of the value which trustees are

generally authorized to lend on mortgage of unregistered land; see stat. 56 & 57 Viet. c. 53, s. 8 (1); *Blyth v. Fladgate*, 1891, 1 Ch. 337, 353, 354; *Re Turner*, 1897, 1 Ch. 536.

(*o*) See Davidson's Concise Precedents, 294 and n., 18th ed.; 312 and n., 19th ed.; 2 Key & Elph. Prec. Conv. 917, 920, 8th ed.; 282, 9th ed., where it is explained that the Inland Revenue authorities claim that such a transfer must bear the same

course, put a caution on the register, so as to be informed of any registered dealing with the land: but the mortgagee cannot safely allow him to enter a restriction on registered dealings therewith without his consent, as this would hamper the exercise of the mortgagee's power of sale. The result is that the mortgagor cannot, without redeeming, effectively control the exercise by the mortgagee of the statutory powers of disposition given to the registered proprietor of land; and the mortgagee may execute registered charges as well as transfers to the prejudice of the equity of redemption. The second manner of mortgaging registered land is for the mortgagee to take a registered charge coupled with an unregistered mortgage of the mortgagor's estate in the land charged (*p*): but in this case it is necessary, in order to prevent the legal estate so assured to the mortgagee from being impaired (*q*) or extinguished (*r*) by a subsequent registered charge on or transfer of the land, that a restriction shall be entered in the register preventing any registered dealings (*s*) with the land

Mortgage by registered charge coupled with an unregistered mortgage of the estate.

stamp as a conveyance on sale: *Encyclopædia of Forms*, viii. 523 and n. It is thought that, in fairness to the mortgagor, the unregistered deed should be executed in duplicate; so that he may retain some evidence in his possession of his right of redemption.

(*p*) See 2 *Key & E'ph. Prec. Conv.* 920, 923, 8th ed.: 281, 286, 9th ed.; *Encyclopædia of Forms*, viii. 523, n., 526. The mortgagee cannot safely dispense with a registered charge; as he must be enabled, in the event of his exercising his power of sale, to execute a transfer, capable of registration, to the purchaser; see stat. 60 & 61 Vict. c. 65, s. 16 (2); above, pp. 118, 1229. A mortgagee intending to take a security of this kind must be careful to obtain an abstract of all unregistered dispositions of

the land, and to make the same searches as if the land were not registered; see above, pp. 498, 500, 580 *sq.*, 1181, 1219. In the case of a mortgage of registered leasehold land, the unregistered mortgage will be by underlease; see *Weymouth v. Davis*, 1908, 2 Ch. 169.

(*q*) Above, p. 1239.

(*r*) Above, p. 1182.

(*s*) If, as suggested below, the mortgagee insist on obtaining a covenant for a transfer to himself in case of his entry into possession, coupled with a power of attorney to effect such transfer, it is necessary that he should also insist on a restriction against any registered dealing without his consent: as he must obtain a fresh covenant to make or concur in the transfer to himself and a fresh power of attorney from every person whom he may per-

charged without the consent of the mortgagee. And as a further precaution against such dealings, the mortgagee should stipulate for possession of the land certificate (*t*). It is also suggested, in the mortgagee's interest (*u*), that a mortgage of this kind should contain a covenant by the mortgagor to transfer the mortgaged land to the mortgagee (subject to redemption) in case the mortgagee shall enter into possession; also a power of attorney from the mortgagor to the mortgagee enabling him to execute such transfer to himself in the mortgagor's name. These precautions will sufficiently secure all the mortgagee's remedies, so long as no transfer of the land from the mortgagor to a third person is registered: but if the mortgagor should desire to make such a transfer, the whole process must be gone through again; so that, after the transfer has been registered with the mortgagee's consent (*x*), and the mortgagee's legal estate extinguished thereby (*y*), he may take back a new legal estate from the transferee, and obtain a new covenant for transfer to himself in case of his entry into possession and a new power of attorney from the transferee to effect such transfer. And of course the restriction on all registered dealings

Searches.

mit to be registered as proprietor either of the land or of a subsequent charge thereon. If the mortgagee be content to do without such covenant, he need only procure a restriction against registering, without his consent, any transfer of the land made either by the registered proprietor of the land or by the registered proprietor of a subsequent registered charge in exercise of his power of sale.

(*t*) See above, pp. 1169, n. (*u*), 1173, n. (*p*).

(*u*) It is eminently desirable for the mortgagee, if obliged to take possession, to be enabled to procure himself to be registered as

proprietor of the land; above, p. 1241. But the covenant and power of attorney here suggested, with the restrictions necessary to maintain their efficacy, place very serious obstacles in the way of the mortgagor's obtaining a loan on the security of a subsequent mortgage of the land. If, however, such covenant and power of attorney be inserted in the mortgage deed, they may as well be made to extend to the case of foreclosure; above, p. 1237 and n. (*u*).

(*x*) The restriction prevents the transfer from being registered without the mortgagee's consent.

(*y*) Above, p. 1182.

without the mortgagee's consent must be carefully maintained. Registered charges subsequent to the first do not appear to deprive the first mortgagee of the legal estate assured to him by unregistered disposition (*z*): but if the suggestion made above be adopted, he should not allow them to be registered without procuring the chargee to enter into the covenant and give the power of attorney above mentioned (*a*); and he must further stipulate for the entry of a restriction on any transfer of the charge without his consent, in order that he may be enabled to procure the like covenant and power of attorney from any registered transferee of the charge. And he must be careful to maintain a restriction on any dealing with the land, or any subsequent charge thereon being registered without his consent. These transactions, of course, entail increased expense, which falls on the mortgagor.

The above remarks apply to mortgages of land registered with an absolute title. Where the land proposed to be mortgaged is registered with a qualified or possessory title, the estates or interests paramount to the title registered (*b*) must be got in and mortgaged by a common assurance outside the register (*c*): and in addition, that part of the estate in the land, which is the subject of the registered title, must be mortgaged in the same manner as if the title registered were absolute.

Mortgages of land registered with a qualified or possessory title.

A variation of the second form of mortgaging registered freehold land has lately been suggested, in which a mortgage by demise for a long term of years is substituted for the unregistered mortgage in fee (*d*). This

Registered charge coupled with an unregistered mortgage by demise for a long term.

(*z*) Above, p. 1238.

(*a*) See above, pp. 1243, 1244 & notes (*s*, *u*).

(*b*) Above, pp. 1168, nn. (*q*, *r*), 1181.

(*c*) See above, pp. 1171, 1173, 1194, 1202—1207.

(*d*) 2 Key & Elph. Prec. Conv. 281, 282, 288, 9th ed.

gives the mortgagee a legal estate in the term (*e*), which is practically as effective for the purposes required (*f*) as an estate in fee, and it enables notice of the lease to be entered in the register. By sect. 50 of the Land Transfer Act, 1875 (*g*), when such notice is so registered, every registered proprietor of the land and every person deriving title through him (excepting proprietors of incumbrances registered prior to the registration of such notice) will be deemed to be affected with notice of the lease as being an incumbrance on the land in respect of which the notice is entered. And it appears from sect. 49 to be the intention of the Act that by the registration of such notice, the estate created by the lease shall be protected from being impaired by any act of the registered proprietor (*h*). Besides this, the Land Transfer Act, 1897 (*i*), has expressly prohibited a term created for mortgage purposes from being registered as a lease; so it may be urged that its validity was not meant to be impaired by subsequent registered dispositions by the grantor or his successors. These appear to be weighty reasons why the Courts may hold that the

(*e*) The lease, being created for mortgage purposes, is not required to be registered in order to pass the legal estate in the term granted; see stats. 38 & 39 Vict. c. 87, s. 11; 60 & 61 Vict. c. 65, ss. 20 (1), 22 (6, *g*) and First Schedule; Land Transfer Rules (1903), 68—70; L. T. R. (1908), IV.; Wms. Real Prop. 506, 519, 21st ed.

(*f*) Above, pp. 1237—1242.

(*g*) Stat. 38 & 39 Vict. c. 87.

(*h*) See sect. 49, partly stated above (pp. 1180, 1181), and further enacting that any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions,

inhibitions or other restrictions as are in this Act in that behalf mentioned. It is, however, submitted that these words may well be construed as enacting merely that the owner of any unregistered estate shall have *such* protection against its being impaired by any act of the registered proprietor as is thereafter mentioned, *i.e.*, such as is given by the express provisions of the Act (sects. 50—58, defining the exact effect of registered notices, cautions, inhibitions and restrictions. This certainly seems to be the meaning of the enactment as regards unregistered estates protected by cautions.

(*i*) Stat. 60 & 61 Vict. c. 65, First Schedule, amending 38 & 39 Vict. c. 87, s. 11; above, n. (*e*).

result of the above provisions is to preserve the legal estate in the term granted from being extinguished by the effect of a subsequent registered transfer for value from the registered proprietor of the land (*k*). And for these reasons, apparently, it has been asserted that the mortgagee of registered land by an unregistered mortgage for a long term will have the legal estate *during the term*, and it has been suggested (*l*) that there is, therefore, no necessity, on taking an unregistered mortgage for a term, to register any restriction on the mortgagor's statutory powers of disposition. But with great deference to this opinion, it is respectfully submitted that it is not so perfectly clear that the enactments cited have this effect as to make it advisable for the mortgagee to omit that precaution. Sect. 50 of the Act of 1875 does not say that the lease, whereof notice is so registered, *shall be* a registered incumbrance (in which case it would be expressly preserved from the effect of a registered transfer for value (*m*)), but merely provides that the transferee *shall be affected with notice* of the lease as an incumbrance on the land. These words would be satisfied if, on a subsequent registered transfer of the land, the like effect were produced as when a purchaser takes a registered conveyance of land in Middlesex with notice of a prior unregistered assurance, which originally passed the legal estate (*n*); that is to say, if the transferee were to acquire the entire legal estate in fee simple subject *in equity* to the lease. And it is submitted that this construction gives effect both to the terms of sects. 30 and 35 and to those of sect. 50 of the Act of 1875, and that it is at least possible that the Courts may adopt this view. But such a construction would not answer

(*k*) Above, pp. 1181, 1182, 1243.

(*l*) 2 Key & Elph. Prec. Conv. 282, 9th ed.

(*m*) Sec. stat. 38 & 39 Vict. c. 87, ss. 39, 35.

(*n*) Above, pp. 373—375.

the mortgagee's purpose of keeping the legal estate in himself unimpaired during the continuance of his security (*o*). And if we seek to rely on the argument that the intention of the Act of 1897 must have been that terms created for mortgage purposes (being incapable of registration) shall not be affected by subsequent registered dispositions, we shall be obliged to push it to this extent, that such terms will not be extinguished or impaired by such dispositions even though no notice of them be registered. Such a conclusion, however, robs us of any support from sect. 49 of the Act of 1875, which seems to indicate clearly that estates created off the register shall only be preserved from being impaired by the notices, &c. therein mentioned (*p*). And it appears to be entirely contrary to the policy of the Act of 1897 that a transferee under a registered transfer should take an estate subject to an unregistered mortgage for a long term of years of which *no* notice has been registered. It seems clear that under the Act of 1875 alone all long terms not noticed on the register, either by being registered as leases or by notice of them being registered, would be extinguished by a subsequent registered transfer for value of the land (*q*). And it may surely be argued that when the Act of 1897 deprived terms created for mortgage purposes of all capacity for registration, that was not meant to invest them with any independent validity or inviolability, but the very reverse was intended. We are driven back therefore to the words used in sect. 50 of the Act of 1875 as the sole support for the opinion that such terms (when notice of them is registered) are not in any way affected by any subsequent registered disposition of the land. Having regard to these

(*o*) See above, pp. 1240, 1242, 1243.

(*p*) See note (*h*), above, p. 1246; *Cocks Hardy, L. J., Capital and*

Counties Bank, Ltd. v. Rhodes, 1903, 1 Ch. 631, 656.

(*q*) Above, pp. 1181, 1182.

considerations, it does not seem to be absolutely safe (so long as the point at issue shall not have been actually decided) to dispense, on taking an unregistered mortgage for a long term, with the entry on the register of the same restrictions as would be required if the unregistered mortgage were in fee (*r*). And, of course, if this precaution cannot safely be omitted, it would be preferable to supplement the registered charge by an unregistered mortgage *in fee*.

(*r*) Above, pp. 1243, 1245. It may perhaps be objected that, if the legal estate in the term granted by a lease, whereof notice is registered, can be extinguished by a subsequent transfer for value of the freehold, then tenants for long terms granted for other than mortgage purposes have no security that they will retain the legal estate in such terms. But it is thought that under the Act of 1875, as under that of 1897, long terms of years, which are themselves registered as leases, become "incumbrances entered in the register," and are thus protected by the express words of sects. 30 and 35 of the Act of 1875 from being extinguished by the effect of a registered transfer of the freehold for valuable consideration. At all events if this be not so, then long terms, which are themselves registered as leasehold interests, must be extinguished by the effect of a subsequent registered transfer for value of the freehold, unless notice of them were registered under sect. 50 of the Act of 1875. No doubt terms of years in registered land can only be created by an unregistered *disposition* under sect. 49 of the Act of 1875: but the protection thereby purported to be afforded (see above, p. 1246 and n. (*h*)) is expressly conferred, not on all estates, &c. created by any unregistered disposition, but on *unregistered estates, rights, interests or equities* in registered land. It appears therefore that the notices mentioned in sects. 49 and 50 were intended (or at least originally intended) to apply only to long terms not registered as leasehold interests; and it is just the difference in the expressions used in sects. 30, 35 and in sect. 50 which creates the difficulty. Under the Land Transfer Rules (1903), No. 63, where a lease of registered land is itself registered as such, it is (subject to any valid objection as therein mentioned) to be noted against the title to the freehold *in the same manner* as notices of leases have to be entered under sects. 50, 51 of the Act of 1875. This seems to show that the case does not fall directly within those sections; as it has been considered expedient to prescribe that it shall be dealt with by *similar* procedure. We may remark that, if a long term granted for mortgage purposes and protected by entry of notice thereof in the register cannot be extinguished at law by the effect of a subsequent registered transfer of the freehold for value, it would be possible to make an effectual mortgage, off the register, of registered land by demise for a long term alone, and registration of notice of the term; especially if an assignment of a long term originally created for mortgage purposes does not require to be registered in order that it may pass the legal estate; see above, p. 1246, n. (*e*). But this result does not appear to be in accordance with the general policy of the Act of 1897.

Sale followed
by a mort-
gage of
registered
land.

Mortgages of registered land being generally carried out in one of the two modes of assurance above described (*s*), the problem is how to combine such a mortgage with a conveyance on sale when it is intended to pay part of the price with the mortgage money. There is no difficulty if the mortgage is to be secured by a registered transfer of the land charged to the mortgagee. The transfer is taken direct from the vendor to the mortgagee at the purchaser's request; and if the title has been cleared, all outstanding estates or interests duly got in and a priority notice (*t*) obtained, the mortgage money can safely be paid on receipt of the instrument of transfer and the mortgage deed, duly executed by all necessary parties, and of the land certificate with the priority notice endorsed (*u*). But if the mortgage is to be taken by registered charge, coupled with an unregistered mortgage of the purchaser's estate in the land, the transaction is complicated. As regards the proposed registered charge, the Land Transfer Act, 1897 (*x*), enables a person, on whom the right to be registered as proprietor of land has been conferred by an instrument of transfer in accordance with the Acts, to charge the land before he is himself registered as proprietor; and a charge so made shall have the same effect as if the person making it were registered as proprietor. The purchaser can therefore execute an effectual instrument of charge after the transfer to himself has been *executed* and before it is *registered*; and the two instruments (of transfer and charge) can be handed in together for registration. The difficulty of the transaction is how to secure that the mortgagee shall obtain the unregistered legal estate; as if that be conveyed to him before the registration of the

(*s*) Above, p. 1242.

(*t*) Above, p. 1184.

(*u*) Above, pp. 1186, 1189.

(*x*) Stat. 60 & 61 Vict. c. 65,
s. 9 (6): Land Transfer Rules
(1903), 104, 105.

transfer to the purchaser it will be extinguished by the effect of such transfer (*y*). It is therefore necessary that the purchaser, having taken a grant of the vendor's legal estate either in the instrument of transfer or by a separate assurance (*z*), shall execute an unregistered mortgage of the land to the mortgagee, containing all provisions proper on a mortgage of registered land in the second manner above described (*a*), and also a covenant by the purchaser that after he has been registered as proprietor of the land, he will grant it to the mortgagor, subject to redemption. The mortgage money is advanced on receiving this deed and the instrument of charge, together with the application for the necessary restriction (*b*), all duly executed by the purchaser (*c*): but after the registration (*d*) of the pur-

(*y*) Above, pp. 1181, 1182, 1247—1249 and n. (*r*).

(*z*) Above, pp. 1185 and n. (*h*), 1200, 1204.

(*a*) Above, p. 1243.

(*b*) Above, p. 1243.

(*c*) It is thought that this may be safely done, especially if (as above suggested, p. 124) the mortgage

deed contain a covenant by the purchaser to transfer the land to the mortgagee in case of the mortgagee's entry into possession, and the necessary restriction be entered in the register to prevent the purchaser from registering any transfer or charge without the mortgagee's consent.

(*d*) It is thought that this deed may be executed at any time after, but not before, the transfer to the purchaser has been delivered for registration at the Office of Land Registry and the necessary entries consequent thereon have been settled; see above, pp. 1183, 1186. It is thought that the mortgagee cannot safely accept an undated deed of conveyance executed by the mortgagor, before his registration, as an escrow, and given to the mortgagee's solicitor to be delivered and dated after the registration. In the first place, the mortgagor has not, at the time of the execution of the deed as an escrow, the power and ability to make the necessary conveyance; for he has not then the legal estate, which he desires to assure—viz., that which will be vested in him on execution of the statutory power; see *Butler and Baker's case*, 3 Rep. 35 b; Shepp. Touch. 59; above, p. 1182 and n. (*y*). And it is well established that at law a man cannot make a valid conveyance of any property, which he has not, but merely expects to have; see Wms. Real Prop. 69, n. (*h*), 21st ed.; Wms. Pers. Prop. 92, 93, 16th ed., and authorities there cited; *Re Ellenborough*, 1903, 1 Ch. 697. It is thought that this rule (and, we may add, the rule prohibiting the grant of a freehold estate to commence at a future time; *Savill Bros., Ltd. v. Bethell*, 1902, 2 Ch. 523, 540) cannot be evaded by such a simple contrivance as to execute a deed as an escrow, to be finally delivered when the expected estate shall have vested in the grantor or when the grant is desired to commence. Secondly,

Execution of the deed of confirmation as an escrow.

chaser as proprietor of the land, he must execute a further deed conveying the legal estate to the mortgagee in pursuance of his covenant (e). It has been suggested that, if the unregistered mortgage be taken by demise for a long term of years and notice of such lease be registered, any confirmatory deed will be unnecessary (f). But owing to the doubt above mentioned (g) it is respectfully submitted that this course is not perfectly safe.

Date of a
deed.

it is thought that after final delivery the deed would relate back to the time of its execution as an escrow; Shepp. Touch. 59; *Edmunds v. Edmunds*, 1904, P. 362, 374. And it is well settled that a deed takes effect from the time of its delivery, and not from its date, and that a party to the deed is not estopped by the date written therein from showing that it was delivered at some other time; Plowd. 491; *Goddard's case*, 2 Rep. 4; *Clayton's case*, 5 Rep. 1; *Oskey v. Hicks*, Cro. Jac. 263; Co. Litt. 46 b; Shepp. Touch. 72; *Stone v. Bale*, 3 Lev. 318; *Doe d. Whatley v. Telling*, 2 East, 257; *Hall v. Cazenove*, 4 East, 477; *Steele v. Mart*, 4 B. & C. 272; *Broune v. Burton*, 17 L. J. Q. B. 49; *Jaynes v. Hughes*, 10 Ex. 430. Thirdly, it is thought that, although the insertion of the date of a deed after its execution is in general an immaterial alteration not sufficient to avoid the deed (*Crediton v. Exeter*, 1905, 2 Ch. 455), in the case under consideration the date is material, and to insert it after execution as an escrow might have the effect of avoiding the deed; see *Davidson v. Cooper*, 13 M. & W. 343, 352; *Suffell v. Bank of England*, 9 Q. B. D. 555, 559, 571; *Ellesmere Brewery Co. v. Cooper*, 1896, 1 Q. B. 75; *Re Howgate and Osborn's contract*, 1902, 1 Ch. 451, 454; and consider *Société Générale de Paris v. Walker*, 11 App. Cas. 20. The mortgagor, however, may well give a power of attorney to the mortgagee authorizing him to execute the necessary deed of conveyance, after the mortgagor's registration, in the mortgagor's name; and such a power of attorney is usually inserted in the mortgage deed; see 2 Key & Elph. Prec. Conv. 921, 928, 8th ed.; 283, 291, 9th ed.

(e) It is thought that, when registered land is let on lease subject to covenants by the lessee and the usual condition of re-entry, and the freehold reversion is transferred by registered transfer, the transferee will be an assignee of the reversion within the meaning or the equity of stat. 32 Hen. VIII. c. 34, and so enabled to enforce the lessee's covenants and the condition of re-entry; for although he appears not to take the transferor's estate but to come in by a new title (above, p. 1182 and n. (y)), he claims by the act of the trans-

feror; see Co. Litt. 215; Bac. Abr. Covenant (E. 6); *Lincoln College's case*, 3 Rep. 58, 62 b; *Williamson v. Hancock*, 1 Mod. 192, 193; *Glover v. Cope*, 3 Lev. 326; *Skinner*, 305, 307; *Whitton v. Peacock*, 3 My. & K. 325. The transferee would certainly be entitled to the rights and remedies given by the Conveyancing Act of 1881 (stat. 44 & 45 Vict. c. 41), s. 10; see above, pp. 401--401.

(f) 2 Key & Elph. Prec. Conv. 233, 293, 9th ed.

(g) Above, pp. 1246—1249.

Somewhat similar difficulties arise in the case of a sale of unregistered land situate in a compulsory registration district, when a mortgage is to be made to secure part of the purchase money; as the legal estate does not pass under a conveyance completing such a sale unless or until the purchaser is registered as proprietor of the land (*h*). Various devices have been suggested to meet these difficulties (*i*): but it is thought that the plan most favourable for the mortgagee is to take a conveyance of the land sold direct from the vendor, with the concurrence of any other necessary parties, by way of mortgage to secure the proposed loan, the mortgage money being paid to the vendor and the right of redemption reserved to the *vendor* (*k*), his heirs and assigns, but a proviso being inserted that the vendor shall not be personally liable to repay the money, and the purchaser entering into the usual covenants for payment of the principal money advanced and the interest thereon. It is thought that such a deed will certainly pass the legal estate to the mortgagee (*l*). The vendor may then convey the equity of redemption to the purchaser. If after this it be desired to register the land, the mortgagee will occupy the position of an incumbrancer prior to first registration (*m*); and it is thought that his legal estate and interest under his incumbrance will remain paramount to and unaffected by the registration of the purchaser as proprietor of the land (*n*), and that he will be enabled to register himself as proprietor of the incumbrance without losing these advantages (*o*). There is no disadvantage in this plan to the purchaser, if he is

Sale and mortgage of unregistered land situate in compulsory registration district.

h, Above, pp. 380 *sq.*

(*i*) 2 Key & Elph. Prec. Conv. 925—930, 8th ed.; 283, 9th ed.; Prideaux. Prec. Conv. ii. 803, 19th ed.; Encyclopædia of Forms, viii. 523, n.

(*k*) It is thought that, if the right of redemption were reserved to the purchaser, the legal estate

would not pass to the mortgagee; see above, pp. 381, 382.

(*l*) See above, pp. 381, n. *c*, 382.

m Above, pp. 1171 *sq.*, 1228 *sq.*

(*n*) Above, pp. 1168, nn. (*p*, *q*, *r*, 1176, 1181, 1228 *sq.*

(*o*) Above, p. 1175.

to be registered with an absolute title as proprietor of the land; for such registration will have the effect of extinguishing any outstanding equitable interests adverse to his own. If however the purchaser is to be registered with a possessory title or is not to be registered, he will, as he has had a conveyance of a mere equitable estate, take subject to any prior equitable interests which may have affected the land sold in the vendor's hands and have not been duly assured to the mortgagee or to himself (*p*). But it appears that the purchaser must run this risk if the parties propose to evade the necessity for registration. If the above plan cannot be adopted, as where the vendor is selling under a trust for (*q*) or power of sale or under the power of sale given by the Settled Land Acts, or has stipulated that the purchaser shall be registered, the like procedure must be followed as in the case of a mortgage of land already registered (*r*); that is to say, after the conveyance of the land sold to the purchaser, he must execute an unregistered mortgage thereof to the mortgagee, covenanting to execute (after his registration) to the mortgagee a transfer of the land (subject to redemption) or a registered charge

(*p*) Above, p. 476 and n. (*q*).

(*q*) It is suggested that, where the vendor holds the legal estate on trust for sale, as also where he is absolute owner, the following course may be taken:—Let the sale be completed by a conveyance to the purchaser in common form. This will leave the legal estate in the vendor on trust for the purchaser. Then let the vendor and purchaser together mortgage the land to the mortgagee, the vendor concurring as a bare trustee of the legal estate at the purchaser's direction, and the right of redemption being reserved to the purchaser, his heirs and assigns. It is submitted that this deed would be a pure mortgage and

would not be "a conveyance executed on sale, by virtue whereof there is conferred or completed a title under which an application may be made for registration as first proprietor of land"; see above, pp. 381, n. (*e*), 382. The previous conveyance to the purchaser would have already conferred on him a complete title to be registered as first proprietor of the land; above, p. 382, n. (*f*). It is thought that, if after this the purchaser's title should be registered, the mortgagee would be in the position of an incumbrancer prior to first registration; above, p. 1253.

(*r*) Above, pp. 1250—1252 and n. (*d*).

thereon coupled with a conveyance of the legal estate, according to the form of security agreed to be adopted. And such transfer, or charge and conveyance, must be executed accordingly (*s*). But in this case, unless payment of the purchase money can be delayed until the registration of the purchaser's title is ready for completion (*t*), the mortgagee is exposed to the dangers involved in advancing his money against the conveyance of a mere equitable estate (*u*). He may be willing to run this risk if he be making the loan on his own account: but he can scarcely be advised to take it where he is a trustee proposing to invest the trust money on the mortgage.

The writer must here conclude. In the chapter now ended he has not attempted more than to examine the leading principles, which should guide the conveyancer instructed to carry out a sale of registered land. The subject is so intricate that it would require a whole treatise to expound it fully.

(*s*) 2 Key & Elph. Prec. Conv. 927—930, 8th ed.; 283, 284, 294—298, 9th ed. Under the Land Transfer Rules (1903), 96, the purchaser, having (with the vendor's consent) the right to apply for registration as first proprietor of the land, may, before he is so registered, transfer or charge the land in the same manner as if he were so registered; and such transfer or charge will, when completed by registration, have

the same effect as if the person making it were so registered. And under rule 117, a priority notice may be obtained in favour of such a transfer or charge.

(*t*) See above, pp. 385, 386; and see previous note as to a priority notice. On a sale by auction the vendor would stipulate for payment of the purchase money before the purchaser's registration.

(*u*) Above, p. 476 and n. *q*).

CHAPTER XXI.

OF THE DEATH DUTIES.

The death
duties.

WE now come to the subject of the death duties, by which term the taxes imposed on the succession to property after death are commonly referred to. As we have seen (*a*) it is the duty of the conveyancer advising the purchaser to see that none of these remains charged on the lands sold. A short account of these duties will not therefore be out of place.

Probate duty.

The earliest of the death duties is that commonly called probate duty (*b*); which was a stamp duty imposed on the grant of probate of a will or of letters of administration in respect of the value of the deceased person's personal estate situate within the jurisdiction of the Court granting the probate or administration (*c*). Wills of real estate not formerly requiring to be proved (*d*), probate duty was never payable in respect of any interest in land to which the testator was entitled as real estate, whether at law or in equity (*e*). It was not therefore payable on lands directed by will to be sold, or settled by the testator himself on a revocable trust for sale and payment to himself of the proceeds (*f*). But probate duty was payable in respect of any equitable interest in lands which was absolutely impressed with the character of personalty, as the interest of a

(*a*) Above, p. 174.

(*b*) See Hanson, *Death Duties*, 1, 10, 4th ed.

(*c*) 1 Wms. Exors., pt. i. bk. vii. pp. 617 *sq.*, 7th ed.; Wms. Pers. Prop. 451, 16th ed.

(*d*) Above, p. 162.

(*e*) See 1 Wms. Exors., pt. i. bk. vii. pp. 617 *sq.*, 7th ed.; Hanson, *Death Duties*, 274, 4th ed.; 679, 5th ed.

(*f*) *Matson v. Swift*, 8 Beav. 368, 9 Jur. 521.

vendor of lands (*g*) or of a *cestui que trust* under an absolute trust for sale (*h*), the interest of a partner in real estate forming part of the partnership assets (*i*), or real estate purchased under an order in Lunacy with the accumulations of the income of a lunatic's personality and declared in the conveyance to belong to him as personal estate (*k*). Leascholds for years, being chattels, were of course subject to probate duty (*l*). Purchasers investigating a title to any personality, which has passed by will or on intestacy, are not concerned to inquire whether the probate duty was duly paid. Their only care need be to obtain production of the probate copy of the will or the letters of administration; neither of which would be issued until the duty was paid (*m*). Probate duty was payable by the executor or administrator (*n*): it was not made a charge on the property according to the value whereof it was levied. But the statute, by which personality subject to a general power of appointment exercised by will was first made liable to probate duty, provided that the duty so imposed should be a charge on the property in respect of which it was payable (*o*). We may notice that an executor may lawfully dispose of his testator's chattels, whether real or personal, before obtaining probate (*p*); he may be obliged to do so to obtain money to pay the necessary duty. In such case a purchaser from him would take the property sold free from any charge of probate duty: but if it were subsequently necessary to prove the executor's title to make the sale, the probate of the will would be the

Leaseholds.

Purchasers need not inquire as to payment of probate duty.

(*g*) *A.-G. v. Brunning*, 8 H. L. C. 243, 6 Jur. N. S. 1083.

(*h*) *A.-G. v. Lomas*, L. R. 9 Ex. 29.

(*i*) *A.-G. v. Hubbuck*, 13 Q. B. D. 275.

(*k*) *A.-G. v. Ailesbury*, 12 App. Cas. 672.

(*l*) 1 Wms. Exors., pt. i. bk. vii. p. 622, n., 7th ed.

(*m*) See stats. 55 Geo. III. c. 184, ss. 38, 45, 47; 44 Vict. c. 12, s. 30.

(*n*) Stat. 55 Geo. III. c. 184, s. 37.

(*o*) Stat. 23 & 24 Vict. c. 15, ss. 4, 5.

(*p*) 1 Wms. Exors., pt. i. bk. iv. ch. i. § 2, pp. 302 *sq.*, 7th ed.; above, p. 231, n. (*n*).

only evidence available in a court of justice (*q*). Probate duty was abolished by the Finance Act, 1894 (*r*), as regards property chargeable with the estate duty thereby introduced, and such estate duty was substituted therefor in the case of persons dying *after* the 1st of August, 1894.

Legacy duty. Legacy duty is payable on all legacies, whether given specifically or in one sum or by way of annuity or in any other form, which are payable out of the testator's own personal estate, or any personal estate over which he had a power of appointment; on all gifts of the residue or any share of the residue of a testator's personal estate; and on any personal estate or share therein devolving upon intestacy under the Statutes of Distribution (*s*). But appointments by will under a limited power of appointment, to which any sum of money was subjected by marriage settlement for the benefit of any persons specially named as the objects of the power or of the testator's issue, were exempted from legacy duty (*t*). Leaseholds, as chattels, were originally subject to legacy duty: but by the Succession Duty Act, 1853 (*u*), they were made liable to succession duty instead. Gifts made by will of real estate *in specie* were never chargeable with legacy duty. But legacy duty was payable on any legacy (whether given in one sum or by way of annuity or in any other form (*x*)) charged upon the testator's real estate or given out of

Leaseholds.

Legacies charged on real estate, or the proceeds of sale thereof.

(*q*) Ibid.; *Pinney v. Pinney*, 8 B. & C. 335; *Brazier v. Hudson*, 8 Sim. 67; *Pinney v. Hunt*, 6 Ch. D. 98.

(*r*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.

(*s*) Stats. 36 Geo. III. c. 52, s. 2; 55 Geo. III. c. 184, Sched., pt. iii., amended by 8 & 9 Vict. c. 76, s. 4; and 51 & 52 Vict. c. 8, s. 21 (2); Wms. Pers. Prop. 458, 16th ed. The rates of legacy

duty are the same as those of succession duty; see below.

(*t*) Stat. 8 & 9 Vict. c. 76, s. 4. Such appointments, however, give rise to a liability to succession duty; see below.

(*u*) Stat. 16 & 17 Vict. c. 51, s. 19.

(*x*) Stat. 8 & 9 Vict. c. 76, s. 4, replacing 45 Geo. III. c. 28, s. 4; 36 Geo. III. c. 52, s. 7; see *A.-G. v. Wade*, 1910, 1 K. B. 703.

any moneys to arise by the sale, mortgage or other disposition of his real estate, and also on any bequest of the whole or any share of the clear residue (after deducting debts, funeral expenses, legacies and other charges first made payable thereout, if any) of the moneys to arise from the sale, mortgage or other disposition of any real estate directed (*y*) by will to be sold, mortgaged or otherwise disposed of (*z*). This duty was not charged by statute on the real estate in question (*a*), but was made payable by the trustees to whom the real estate should be devised, or if there should be no trustees then by the persons entitled to the real estate subject to any such legacy (*b*). The persons for the time being entitled to any real estate charged with any legacy or annuity given by will might therefore be liable to pay the legacy duty thereon (*c*). But purchasers of lands devised on trust for sale or otherwise directed by will to be sold took them free from any charge of legacy duty imposed on any part of the proceeds of sale (*d*). By the Inland Revenue Act, 1888 (*e*), legacy duty shall not be levied

(*y*) If the direction for sale were absolute, legacy duty became payable, notwithstanding that the beneficiary elected to take the property *in specie*, as real estate; *A.-G. v. Holford*, 1 Price, 426; *Williamson v. Adv.-Gen.*, 10 Cl. & Fin. 1. If the direction for sale were discretionary, and no sale was made, no legacy duty was payable; *A.-G. v. Mangles*, 5 M. & W. 120; *Adv.-Gen. v. Smith*, 1 Macq. 760. The decisions were conflicting on the question whether duty was payable when the direction for sale was discretionary, and a sale took place in consequence. If in such case the proceeds of sale became liable to be re-invested in the purchase of land, or applied in paying off incumbrances, no duty was payable: but if the proceeds of sale became divisible as personalty,

they were liable to legacy duty. See *Re Evans*, 2 C. M. & R. 206; *A.-G. v. Mangles*, 5 M. & W. 120; *A.-G. v. Sinecox*, 1 Ex. 749; *Miles v. Jennings*, 8 Ex. 830; 2 Wms. Exors., pt. iii. bk. v. ch. ii. pp. 1628—1630, 7th ed.; Hanson, *Death Duties*, 469, 5th ed.

(*z*) Stat. 55 Geo. III. c. 184, Sched., pt. iii. These duties were first imposed by stat. 45 Geo. III. c. 28; 2 Wms. Exors., pt. iii. bk. v. p. 1583, 7th ed.

(*a*) *Noel v. Heuley*, 7 Price, 253.

(*b*) Stat. 45 Geo. III. c. 28, s. 5.

(*c*) *A.-G. v. Jackson*, 2 Cr. & Jer. 101; *Stow v. Davenport*, 5 B. & Ad. 359.

(*d*) Hanson, *Death Duties*, 386, 387, 5th ed.

(*e*) Stat. 51 & 52 Vict. c. 8, s. 21, 2.

Legacies
charged on
real estate
now liable to
succession
duty.

and paid in respect of any legacy (*f*) payable or having effect or being satisfied out of or charged or rendered a burden upon the real or heritable estate of any person dying on or after the 1st of July, 1888, or the rents or profits thereof, which such person shall have had any right or power to charge, burden or affect with the payment of money, or out of or upon any moneys to arise from the sale, mortgage or other disposition of any such real or heritable estate or any part thereof: but succession duty shall be levied and paid in respect of every such legacy as a succession to personal property. Legacy duty is properly payable by the executor before the legacy is paid or satisfied (*g*). But if a legatee be put into possession of the property bequeathed to him, without payment of the legacy duty, he will become liable to the Crown for the duty (*h*). And a purchaser from such a legatee incurs a like liability (*i*). Purchasers from legatees of property subject to legacy duty should therefore require production of the receipt for payment of the duty. But purchasers from executors selling under their general power to dispose of the testator's personalty are not concerned to inquire as to the payment of legacy duty (*k*).

Succession
duty.

Succession duty was made payable by the Succession Duty Act, 1853 (*l*), in respect of the succession on death (*m*) on or after the 19th of May, 1853, to the beneficial interest in any real or personal property (*n*), or the income thereof, either by virtue of any disposi-

(*f*) A gift of the residue, after payment of debts or other charges, of the moneys to arise from the sale of real estate directed by will to be sold (above, p. 1258), would be a legacy.

(*g*) Stat. 36 Geo. III. c. 52, ss. 6, 36.

(*h*) Sect. 6.

(*i*) *Bryan v. Manson*, 3 Jur. N. S. 473; *Hanson*, Death

Duties, 409, 4th ed.

(*k*) See above, p. 1258.

(*l*) Stat. 16 & 17 Vict. c. 51.

(*m*) And on death alone; see *A.-G. v. Eyres*, 1909, 1 K. B. 723.

(*n*) In the construction, and for the purposes of this Act, the term *real property* includes leasehold hereditaments, and the term *personal property* does not; sect. 1.

tion of the property or on devolution by law (*o*): except in cases where legacy duty was already chargeable in respect of the succession (*p*). It is the disposition or devolution giving rise to the succession (not the succession itself) which creates the liability to succession duty (*q*): but no duty is payable in respect

(*o*) Sects. 2, 10, 54.

chargeable with succession duty,

(*p*) Sect. 18. But leaseholds,

instead of legacy duty.

as we have seen, were made

(*q*) See sect. 2, which is in these words:—"Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." By sect. 1, the term "succession" shall denote any property chargeable with duty under this Act. By sect. 10, as amended by stat. 10 Edw. VII. c. 8, s. 58 (1), duty is charged on such "successions" at the following rates:—Where the successor is to the predecessor—

Rates of
succession
duty.

- (1) Lineal issue or ancestor, or husband or wife, 1*l.* per cent., subject to the exemptions mentioned below.
- (2) Brother or sister, or descendant of a brother or sister, 5*l.* (originally 3*l.*) per cent.
- (3) Brother or sister of the father or mother, or descendant of such brother or sister, 10*l.* (originally 5*l.*) per cent.
- (4) Brother or sister of the grandfather or grandmother, or descendant of such brother or sister, 10*l.* (originally 6*l.*) per cent.
- (5) In any other degree of collateral consanguinity, or a stranger in blood, 10*l.* per cent.

Legacy duty is charged at the same rates: stats. 55 Geo. III. c. 184, Sched., pt. iii.; 10 Edw. VII. c. 8, s. 58. A person chargeable with succession or legacy duty, who shall have been married to any wife or husband of nearer consanguinity than himself or herself to the predecessor, pays the same rate of duty only as such wife or husband would have been chargeable with; stat. 16 & 17 Vict. c. 51, s. 11.

Where property becomes subject to a trust for any charitable or public purposes under any disposition which, if made in favour of an individual, would confer on him a succession, succession duty is payable in respect of such property, upon its becoming subject to such trusts, at the rate of 10*l.* per cent. on the amount or principal value thereof; stat. 16 & 17 Vict. c. 51, s. 16.

Property
subject to
charitable or
public trusts.

of any interest in property until some person has become entitled thereunder in possession (*r*). If there-

Legacy and succession duty as between issue and ancestor and husband and wife.

Legacy or succession duty at the rate of one per cent. as between lineal issue and ancestor was not payable in respect of any property on the value of which either probate or account duty (see below) had been paid under the Inland Revenue Act, 1881 (stat. 44 Vict. c. 12, s. 41), or in respect of property chargeable with estate duty under the Finance Act, 1894 (stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule; see below), on any death occurring *after* the 1st Aug. 1894. And legacy or succession duty was not payable as between husband and wife on any death occurring *before* the 30th April, 1909; see stats. 55 Geo. III. c. 184, Sched. pt. iii.; 16 & 17 Vict. c. 51, s. 18; 10 Edw. VII. c. 8, s. 58 (2, 4). But by the Finance (1909-10) Act, 1910 (stat. 10 Edw. VII. c. 8, s. 58 (2-4)), legacy and succession duty at the rate of one per cent. were re-imposed as between lineal issue and ancestor and imposed as between husband and wife, subject to exemption in the cases following:—

Exemptions in such cases.

- (a) Where the principal value of the property passing on the death of the deceased in respect of which estate duty is payable (other than property in which the deceased never had an interest, and property of which the deceased never was competent to dispose and which on his death passes to persons other than the husband or wife or a lineal ancestor or descendant of the deceased) does not exceed 15,000*l.*, whatever may be the value of the legacy or succession;
- (b) Where the amount or value of the legacy or succession together with any other legacies or successions derived by the same person from the testator, intestate or predecessor does not exceed 1,000*l.*, whatever may be the principal value of such property;
- (c) Where the person taking the legacy or succession is the widow or a child under the age of twenty-one years of the testator, intestate or predecessor, and the amount or value of the legacy or succession together with any other legacies or successions derived by the same person from the testator, intestate or predecessor, does not exceed 2,000*l.*, whatever may be the principal value of such property.

By sub-sect. 3, in this section the expression “deceased” means, as to legacy duty, the testator or intestate, and in the case of a succession arising through devolution by law the person on whose death the succession arises, and in the case of a succession arising under a disposition, the person on whose death the *first* succession thereunder arises. And by sub-sect. 4, this section shall take effect as to legacy duty where the testator or intestate dies on or after the 30th April, 1909, and in the case of a succession arising through devolution by law only where the succession arises on or after that date, and in the case of a succession arising under a disposition, only if the *first* succession under the disposition arises on or after that date.

Other exemptions.

Legacy or succession duty is not payable by any member of the royal family; stats. 55 Geo. III. c. 184, Sched. pt. iii.; 16 & 17 Vict. c. 51, s. 18. Succession duty is not payable where the whole succession or successions derived from the same predecessor and passing on any death to any person or persons shall not amount in money or

[*r*. Stat. 16 & 17 Vict. c. 51, s. 20.

fore lands be settled on one for life with remainder in tail or in fee, a liability to succession duty on the death of the tenant for life is immediately created: but the duty is not payable until his death (*s*). Succession duty of course becomes chargeable on a testator's death in respect of the devise of any beneficial interest he had in any real or leasehold property, or if a man die intestate, in respect of the devolution of his real estate to the heir or of his leaseholds to the persons entitled under the Statutes of Distribution (*t*). The duty is also payable on succession to any beneficial interest in any property by reason of the survivorship prevailing in the case of persons jointly entitled (*u*). And succession on death under an exercise of a power of appointment, whether general or limited, is as well chargeable with duty as succession under a direct disposition (*x*). Succession duty is further payable in

Lands settled for life and over.

Devise or descent.

Joint tenants beneficially entitled.

Exercise of powers of appointment.

principal value to 100*l*.; stat. 16 & 17 Vict. c. 51, s. 18; see 52 Vict. c. 7, s. 10 (2). Legacy duty is not payable where the value of the whole of the testator's or intestate's personal estate does not amount to 100*l*.; stat. 43 & 44 Vict. c. 14, s. 13. And where the net value of the property, in respect of which estate duty is payable on some death (exclusive of property settled otherwise than by the will of the deceased) does not exceed 1,000*l*., and the fixed duty (payable where the gross value of such property does not exceed 500*l*.) or estate duty has been paid upon the principal value of that estate, the legacy and succession duties shall not be payable under the will or intestacy of the deceased in respect of that estate; stat. 57 & 58 Vict. c. 30, s. 16 (3); see s. 16 (2); stat. 10 Edw. VII. c. 8, s. 61 (2). Also in cases of death on or after the 30th April, 1909, objects of national, scientific, historic or artistic interest are exempted from legacy and succession duty while enjoyed in kind; and such duty will only become chargeable when the property is sold and then only in respect of the last death on which the property passed; stat. 10 Edw. VII. c. 8, s. 63, extending 59 & 60 Vict. c. 28, s. 20, which partially exempted such objects from estate duty; see below.

(*s*) See sects. 15, 20.

(*t*) 22 & 23 Car. II. c. 10; 1 Jac. II. c. 17, s. 7.

(*u*) Stat. 16 & 17 Vict. c. 51, s. 3.

(*x*) Succession under powers of appointment is provided for partly by sect. 2 and partly by sect. 4; see notes thereto in *Hanson's Death Duties*, 527 *sq.*, 546 *sq.*, 5th ed.; *Re Loveiace's Settlement*, 4 De G. & J. 340. In the case of limited powers, the succession is deemed to be derived from the donor of the power as predecessor; sect. 4. And the general rule is the same in the case of general powers; *Charlton v. A.-G.*, 4 App. Cas. 427. But by sect. 4, on the exercise of a general power which has taken effect on a death occurring after the commence-

ment, 4 De G. & J. 340. In the case of limited powers, the succession is deemed to be derived from the donor of the power as predecessor; sect. 4. And the general rule is the same in the case of general powers; *Charlton v. A.-G.*, 4 App. Cas. 427. But by sect. 4, on the exercise of a general power which has taken effect on a death occurring after the commence-

Increase of
benefit by
extinction of
charge, &c.

Succession
subject to
prior charge,
&c. not
created by the
successor.

Disposition
reserving
benefit to the
grantor for
term of life.

respect of the increase of benefit accruing to any person upon the extinction or determination of any charge, estate or interest, to which his property is subject, and which is determinable by the death of any person or at any period ascertainable only by reference to death (*y*); as, for example, where an heir has succeeded, subject to the right of his ancestor's widow to dower and the widow dies, or where one has taken land under a voluntary conveyance *inter vivos*, subject to some estate or interest for life, and the owner of the life interest dies (*z*). And if property, in respect of which succession duty is payable, be subject to any prior charge, estate or interest not created by the successor himself, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate or interest shall, if not previously paid, compounded for or commuted, be paid at the time of such determination (*a*). This provision applies where one succeeds in possession to land subject to some rentcharge or annuity not created by himself (*b*) or to land let by his predecessor for any term of years at a ground rent or other rent lower than its full annual value (*c*). And to prevent evasion of the Act, where any disposition of property, not being a *bonâ fide* sale and not conferring an interest expectant on death, has been made with the reservation or assurance of or contract

ment of the Act, the appointor is to be deemed to be entitled to the property appointed as a succession derived from the donor of the power. If in such a case the appointment be made to take effect on a death (as if it be exercised by will or being exercised by deed its operation be suspended until the determination of some life interest), the appointee will take the property as a succession derived from the

appointor; *A.-G. v. Upton*, L. R. 1 Ex. 224.

(*y*) Sect. 5.

(*z*) See *Harding v. Harding*, 2 Giff. 597; *Hanson*, Death Duties, 552—555, 605, 5th ed.

(*a*) Sect. 20.

(*b*) See *Re Peyton*, 7 H. & N. 265.

(*c*) *Re Kidd & Gibbons' Contract*, 1893, 1 Ch. 695; *Re Weston & Thomas's Contract*, 1907, 1 Ch. 244; above, p. 400.

for any benefit to the grantor or any other person for any term of life or for any other period ascertainable only by reference to death, succession duty is charged on the determination of such benefit in respect of the increase so caused of beneficial interest in the property (*d*); and succession duty is made payable, where any disposition of property has been made to take effect at a period ascertainable only by reference to the date of the death of any person dying on or after the 19th of May, 1853, and also where any disposition of property purports to take effect presently or under such circumstances as not to confer a succession, but by the effect or in consequence of any engagement, secret trust, or arrangement capable of being enforced in a court of law or equity, the beneficial ownership of such property shall not *bonâ fide* pass according to such disposition, but shall in fact devolve to any person on death, or at some period ascertainable only by reference to death (*e*).

Disposition to take effect at a period ascertainable only by reference to death.

Immediate disposition subject to secret arrangement that the beneficial ownership shall not pass till death.

Where any person shall take a succession under a disposition made by himself, then, if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying on or after the 19th of May, 1853, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession, at the same rate as he would have been chargeable with if no such disposition had been made: but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself. And no person shall be chargeable with duty upon the extinction or determination of any charge, estate, or interest created by himself, unless at the date of the creation thereof he shall have been

Succession under a disposition made by the successor himself.

Extinction of charge, &c., created by the successor himself.

(*d*) Sect. 7. See *A.-G. v. Johnson*, 1903, 1 K. B. 617.

(*e*) Sect. 8.

Under a resettlement of lands by tenants for life and in tail.

All succeeding after the tenant for life take under a disposition by the tenant in tail.

Even though they take under powers created by the resettlement.

entitled to the property subjected thereto expectantly on the death of some person dying on or after the 19th of May, 1853 (*f*). The case contemplated by the former part of this enactment is illustrated by the resettlement of lands limited to a father for life, with remainder to his son in tail, the estate tail being assured by a disentailing deed, according to the regular practice, to such uses as the father and son shall jointly appoint, and the lands being limited by the resettlement to the father for life, with remainder to the son for life, with remainder to trustees for a term to raise portions for the son's younger children, with remainder to the son's first and other sons successively in tail. In such case, whatever were the date of the resettlement, if the father died on or after the 19th of May, 1853, the son succeeding him as tenant for life became liable to succession duty at the same rate as he would have paid if there had been no resettlement, all uses limited under the resettlement to arise after the father's death being regarded as taking effect out of the original estate tail and therefore as created by a disposition made by the son, whose estate tail was barred (*g*). The son's children therefore become liable to succession duty on his death, in respect of their estates or portions, as on a succession from their father; and if the son's issue should fail, and any collateral relations succeed to any estates or portions under limitations in their favour contained in the resettlement, they will in their turn be liable to succession duty according to the degree of their relationship to the tenant in tail. And if on a resettlement by tenants for life and in tail, the lands are limited to such uses as they shall jointly appoint or as other persons shall appoint, and any of such powers is afterwards exercised, all uses limited under the power to

(*f*) Stat. 16 & 17 Vict. c. 51, s. 12. As to the last proviso, see *Re Peyton*, 7 H. & N. 265.

(*g*) *A.-G. v. Sibthorp*, 3 H. & N. 424; *Braybrooke v. A.-G.*, 9 H. L. C. 150.

arise after the tenant for life's death are considered, for the purposes of succession duty, to take effect out of the estate tail and to be created by a disposition made by the tenant in tail (*h*).

Where succession duty is payable on any personal property (other than leaseholds), it is to be assessed and paid in the same manner as if such personal property were a legacy bequeathed by the predecessor to the successor (*i*). If therefore the successor becomes absolutely entitled to such property, duty is chargeable on the principal value thereof (*k*); whilst in the case of annuities and successive interests the duty is chargeable as on legacies given in similar form (*l*). By the Succession Duty Act, the duty on a succession to real or leasehold property was made payable on the value (to be calculated according to the tables in the schedule to the Act (*m*)) of an annuity equal to the annual value (*n*) of such property during the successor's life,

Assessment of succession duty on personalty.

On real or leasehold property.

- (*h*) *Re Peyton*, 7 H. & N. 265; *A.-G. v. Floyer*, 9 H. L. C. 477; *A.-G. v. Smythe*, ib. 497; *A.-G. v. Cecil*, L. R. 5 Ex. 275; *Charlton v. A.-G.*, 4 App. Cas. 427. (*i*) Stat. 16 & 17 Vict. c. 51, s. 32. (*k*) Stat. 36 Geo. III. c. 52, s. 23. (*l*) Stat. 36 Geo. III. c. 52, ss. 8, 10—12, 14; *Cuddon v. Cuddon*, 4 Ch. D. 583; *A.-G. v. Aberdare*, 1892, 2 Q. B. 684. (*m*) Stat. 16 & 17 Vict. c. 51, s. 31.

(*n*) As to the rules for ascertaining such annual value, see sects. 22, 25, 26, 28, 31. Where the annual value, at the time when the successor became entitled in possession, was nothing, it was held that no succession duty was payable; *A.-G. v. Sefton*, 11 H. L. C. 257. By the Succession Duty Act, succession duty was made payable in respect of the successor's interest in the net proceeds of sale of any timber, trees or wood (not being coppice or underwood), comprised in the succession and sold; sect. 23. But where the successor has sold the land and growing timber together, whether at one price or at separate prices, it has not been the practice of the office to demand duty on the proceeds of the sale of the timber either from vendor or purchaser, or to demand duty if the purchaser subsequently cut the timber; *Hanson*, *Death Duties*, 626, 5th ed. By the Finance (1909-10) Act, 1910, stat. 10 Edw. VII. c. 8, s. 61 (*o*), succession duty payable in respect of woodlands on the death of any person dying on or after the 29th April, 1910, is to be governed by the like rules as are there laid down as to the payment of estate duty in respect of land, whereon timber, trees, or wood are growing (see below, p. 1294, n. (*z*)); except that nothing in this enactment shall affect the rate of succession duty.

Timber.

Woodlands.

or for any less period during which he might be entitled; and the duty was required to be paid by eight equal half yearly instalments, commencing at the end of twelve months after the successor should have become entitled to the beneficial enjoyment of the property (*o*). But if the successor should die before all such instalments should have become due, then any instalment not due at his decease should cease to be payable; except in the case of a successor who should have been competent to dispose by will (*p*) of a continuing interest in such property, in which case the instalments unpaid at his death should be a continuing charge on such interest in exoneration of his other property, and should be payable by the owner for the time being of such interest (*q*). But where any body corporate, company or society should become entitled, as successors, to any real or leasehold property, the duty in respect thereof was required to be assessed

Where the
successor is a
corporation,
&c.

Under these rules, it appears that the value of the timber, trees or wood growing on woodlands is to be taken into account at the death for the purpose of determining the value of the woodlands, but the succession duty in respect of the timber, &c. is only to become payable either (1) on the net moneys received from the sale of the timber, &c., when felled, during the period which may elapse until the woodlands on the death of some other person again become liable to succession duty, or (2) if at any time the timber, trees or wood are sold, either with or apart from the land on which they are growing, then at that time and in respect of the principal value of the timber, &c., as ascertained at the death, after deducting the amount (if any) of such duty since paid under case (1). Purchasers of woodlands must have regard to this liability, and see that any duty charged thereon in respect of the timber, trees or wood is discharged by the vendor before the completion of the sale. Succession duty is not payable in respect of any advowson or church patronage comprised in any succession, unless the same or some right of presentation or other interest therein be disposed of for money or money's worth by or in concert with the successor, when he is chargeable with duty on the amount or value of the proceeds of such disposition; stat. 16 & 17 Vict. c. 51, s. 24.

Advowson.

(*o*) By stat. 51 & 52 Vict. c. 8, s. 22, the successor has the option of paying half the succession duty by four equal annual instalments, commencing at the end of a year after entering upon enjoyment, and the other half either upon the day of payment of the last of such instalments, or by four

further annual instalments with interest at 4/. per cent. on the amount remaining unpaid.

(*p*) *A.-G. v. Hallett*, 2 H. & N. 368.

(*q*) Stat. 16 & 17 Vict. c. 51, s. 21; see sect. 1, above, p. 1260. n. (*n*).

on the principal value of such property (*r*). And succession duty was made payable on the principal value of any property becoming subject on the death of any person to a trust for any charitable or public purposes (*s*). By the Finance Act, 1894 (*t*), succession duty is now made payable on the principal value (less the estate duty created by that Act and the expenses of paying the same) of any real or leasehold property (*u*), if the successor is "competent to dispose of the property," that is to say, if he is a person having "such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail, whether in possession or not" (*x*). In such case the succession duty is made "a charge on the property" (*y*), and is payable by the same instalments (to commence twelve months after the successor became entitled in possession) and with the same interest as are authorized by the Act in the case of estate duty on real property (*z*).

Property subject to public or charitable trusts.

Where succession duty now chargeable on the principal value of real or leasehold estate.

Succession duty is a first charge on the interest of the successor and of all persons claiming in his right in all the real or leasehold (*a*) property in respect whereof the duty is assessed; and is a first charge on the interest of the successor in the personal property (other than lease-

Charge of succession duty.

(*r*) Sect. 27. In such cases the duty was payable by the same instalments as upon a natural person's succession to an estate in fee simple.

(*s*) Sect. 16; above, p. 1261, n. (*q*). This duty is apparently payable immediately and not by instalments; Hanson, *Death Duties*, 595, 5th ed.

(*t*) Stat. 57 & 58 Vict. c. 30, s. 18.

(*u*) The Act says "real property": but it is presumed that, sect. 18 being an amendment of the Succession Duty Act, 1853,

the terms used therein bear the meanings attached to them in that Act (see above, p. 1260, n. (*n*)); although elsewhere in the Finance Act, 1894, the term *real property* is used in its usual and proper legal sense; see sect. 6.

(*x*) Sect. 22 (2*a*).

(*y*) Sect. 18; cf. the language of sect. 42 of the Succession Duty Act.

(*z*) Sect. 18; see sect. 6 (*s*), stated below.

(*a*) See sect. 1, above, p. 1260, n. (*n*).

Succession
duty a Crown
debt.

Where settled
lands are sold
under a power
of sale.

Persons
accountable
for succession
duty.

holds) in respect whereof the duty is assessed, while the property remains in the ownership or control of the successor, or of any trustee for him or of his guardian or committee, or tutor or curator, or of the husband of any wife who is the successor. Succession duty is also a debt due to the Crown from the successor, having, in the case of real or leasehold property comprised in any succession, priority over all charges and interests created by him: but the duty does not charge or affect any other real or leasehold property of the successor than the property comprised in such succession. Where any settled real or leasehold property comprised in a succession is subject to any power of sale, exchange, or partition, exercisable with the consent of the successor, or by the successor with the consent of another person, he is not disqualified by the charge of duty on his succession from effectually authorizing by his consent the exercise of such power, or exercising any power with proper consent, as the case may be, and in such case the duty is charged substitutively upon the successor's interest in all real or leasehold property acquired in substitution for the property before comprised in the succession, and in the meantime upon his interest also in all moneys arising from the exercise of any such power, and in all investments of such moneys (b).

The following persons, beside the successor, are personally accountable to the Crown for succession duty, but to the extent only of the property or funds actually received or disposed of by them respectively; that is to say, every trustee, guardian, committee, tutor, or curator, or husband, in whom respectively any property, or the management of any property, subject to such duty, is vested, and every person in whom the same

is vested by alienation or other derivative title at the time of the succession becoming an interest in possession. All such persons are authorized to compound or pay in advance or commute any duty, and retain out of the property subject to any such duty the amount thereof, or to raise such amount, and the expenses incident thereto, at interest on the security of such property, with power to give effectual discharges for the same, and such security shall have priority over any charge or incumbrance created by the successor. In the event of the non-payment of such duty as aforesaid every person so made accountable will be a debtor to the Crown in the amount of the unpaid duty for which he is so accountable (*c*).

Where the interest of any successor in any personal property (other than leaseholds) shall before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in possession; but such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them (*d*). This enactment applies only to successions to personality (*e*); and successions to real or leasehold property are principally regulated by the construction placed on the following provisions of the Act:—Where, at the commencement of the Succession Duty Act, any reversionary property expectant on death was vested, by alienation or other derivative title, in any person other than the person originally entitled thereto under any such disposition or devolution as is mentioned in the second

Duty on transmitted successions to personality.

Duty payable in respect of interests transferred before the Succession Duty Act.

(*c*) Sect. 44.

(*d*) Sect. 14.

(*e*) *Wooiverton v. A.-G.*, 1898,

A. C. 535, 553, 554; Davey,
L. A., *Northumberland v. A.-G.*,
1905, A. C. 406, 416.

section of this Act (*f*), the person in whom such property was so vested was made chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created. And where after the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created. And where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place (*g*).

After the Act.

Acceleration of title by surrender, merger, &c.

Succession duty on remainders in realty transmitted or transferred before falling into possession.

Great difficulty has been encountered and much difference of opinion expressed in ascertaining the true construction of the Succession Duty Act in respect of the duty payable on estates or interests in remainder or reversion (expectant on a life estate) in real or leasehold property, when they have been transmitted or transferred before they fall into possession. The provisions above quoted apply in case of the transfer of such estates by alienation (which in this context appears to mean alienation *inter vivos* only (*h*)), or by some title not conferring a new

(*f*) Above, p. 1261, n. (*g*).

(*g*) Sect. 15. This section has no application where estates for life and in fee in remainder limited in default of appointment are extinguished by an appointment to the remainderman; and in such

case the former liability to succession duty is removed; *A.-G. v. Selborne*, 1 K. B. 388.

(*h*) *Davey, L. A., Northumberland v. A.-G.*, 1905, A. C. 406, 417.

succession: but the Act is silent as to the case of the transmission of such estates during the continuance of the life estate by some title which does confer a new succession, as by descent or devise; and the true construction of the Act in this respect has never been precisely determined by judicial decision (*i*). It appears however that, if during the lifetime of the tenant for life the remainder has been transmitted, *solely* by some title conferring a new succession and not by alienation nor by any title not conferring a new succession, to some other person than the original remainderman, succession duty is only chargeable at the death of the tenant for life upon the new succession (*k*) acquired by the person then becoming entitled in possession from the person, from whom he immediately derived his title to the remainder, as predecessor (*l*); and the duty which was originally chargeable prospectively on the remainder by reason of the disposition creating it (*m*) ceases to be payable. The reason alleged for the original duty ceasing to be payable in such cases is that succession duty is essentially a tax upon the value of the successor's interest in his succession, when that interest falls into possession and (according to its original principle) is calculated with reference to the probable duration of his own actual enjoyment of that interest (*i.e.*, his prospect of life as from the time when he becomes entitled in posses-

Where the remainder is transmitted solely by title conferring a new succession.

(*i*) See *Re Peyton*, 7 H. & N. 265, 303; *A.-G. v. Cecil*, L. R. 5 Ex. 263, 272, 273; *S.-G. v. Law Reversionary Interest Socy.*, L. R. 8 Ex. 233, 238, 240; *Re Cooper & Allen to Harlech*, 4 Ch. D. 802, 823—827, disapproved of, *Wolverton v. A.-G.*, 1898, A. C. 535, 549—555, and overruled, *A.-G. v. Northumberland*, 1904, 2 K. B. 762, and *Northumberland v. A.-G.*, 1905, A. C. 406.

(*k*) It must be borne in mind that the term "succession" is

used in the Succession Duty Act, not in its ordinary sense, but with the special meaning of "any property chargeable with duty under this Act"; above, p. 1261, n. (*g*); *Wolverton v. A.-G.*, 1898, A. C. 535, 543, 544, 548, 549; *Northumberland v. A.-G.*, 1905, A. C. 406, 416.

(*l*) See *Davey, L. A., Northumberland v. A.-G.*, 1905, A. C. 406, 417.

(*m*) See above, pp. 1261—1263.

No duty
on life
estates never
falling into
possession.

Transmission
of remainder
in fee before
falling into
possession.

sion (*n*)); consequently, no duty is payable (except under the express provisions above quoted (*o*)) in respect of a succession, which has never fallen into possession (*p*). Thus where land is assured by X. to A. for life with remainder to B., C. and D. successively for their respective lives with remainder to E. in fee, and B., C. and D. all die in A.'s lifetime, no succession duty ever becomes payable in respect of any of their life estates. And as, according to the Succession Duty Act, the same duty exactly was chargeable upon estates in fee as upon estates for life, with the sole exception that on the death of a tenant in fee any instalments not yet due should remain charged on his interest in the land (*q*), it was considered by the Crown officials that, whenever an estate in fee simple in remainder expectant on a life estate passed by descent or devise alone in the lifetime of the tenant for life, no succession duty would become payable in respect of the deceased remainderman's own interest in the land (*r*). Thus suppose that in the case put E. also dies in A.'s lifetime, and his remainder passes by descent or devise to F. Then on A.'s death F. would only pay duty on the new succession which he acquired from E. as his predecessor, and no further duty would be payable in respect of the succession that E. took from X. The same principle is applicable no matter how often the remainder passes by descent or devise alone in the lifetime of the tenant for life. Thus if E. were a stranger in blood to X., and during A.'s lifetime E.'s remainder passed by descent or devise from E. to F. and from F. to G. and from G. to H., and H. were G.'s wife taking

(*n*) See *Wolverton v. A.-G.*, 1898, A. C. 535, 543; *Davey, L. A., Northumberland v. A.-G.*, 1905, A. C. 406, 416; above, pp. 1261—1263, 1267, 1268.

(*o*) Sect. 15 of the Act; above, pp. 1271, 1272.

(*p*) Hanson, *Succession Duty*, 277, 285, 301, 302, 3rd ed.; Hanson, *Death Duties*, 574, 575, 610, 611, 5th ed.

(*q*) Above, pp. 1267, 1268.

(*r*) See Hanson, *Succession Duty*, 277, 285, 301, 302, 3rd ed.

the remainder by devise from him, then on A.'s death H. would only be chargeable with succession duty on the succession, which she derived from H. as her predecessor; and as H. was her husband, she would, if A. died before the 30th of April, 1909, have been exempted from paying any succession duty at all; and if A. died on or after that day, she would be charged with succession duty at the rate of one per cent. only, subject to exemption in the cases provided for by the Finance (1909-10) Act, 1910 (*s*). It is apparently considered by the Crown officials (*t*) that no change was made in any of the above respects by the provisions of the Finance Act, 1894 (*u*), enacting that the value for the purpose of succession duty of a succession to real property, where the successor is competent to dispose of the property, shall be the principal value of the property, and making the duty "a charge on the property." And it may be urged that the Finance Act, 1894, only altered *the mode of computing* the value of the successor's interest, leaving the value of that interest and the successor's actual enjoyment of it the essential subject of taxation as before (*u*); and further that the duty still remains payable by instalments commencing only at the end of twelve months after the successor has become entitled in possession (*x*). We may note that descent and devise are not the only means by which reversionary property may pass by some title conferring a new succession. Thus where a tenant for life and remainderman in tail disentailed their lands and created a joint power of appointment, which they exercised by appointing a sum of £20,000 to be raised out of the lands on the

Title conferring a new succession.

A.-G. v. Cecil.

(*s*) See above, p. 1262, n. (*g*).

(*t*) The writer was lately concerned in a case, from which it appeared that this is the official view.

(*u*) Stat. 57 & 58 Vict. c. 30, s. 18; above, p. 1269.

(*v*) Above, p. 1269.

(*x*) See above, p. 1268; Hanson, *Death Duties*, 574, 575, 586—590, 610, 611, 5th ed.

death of the tenant for life and paid to A., it was held that A. took the money by title conferring a new succession from the remainderman, as his predecessor, and was chargeable on such death with succession duty accordingly: but the Crown claimed no further succession duty in respect thereof (*y*).

Where a remainder is transferred by alienation or by title not conferring a new succession.

But where a remainder is transferred during the lifetime of the tenant for life either by alienation or by some title not conferring a new succession, there the original liability to succession duty, which was created by the disposition limiting the estates for life and in remainder, is not discharged, but under the above quoted provisions of the Act (*z*) becomes indefeasibly attached to the remainder. And the liability so created will continue to be attached to the remainder, notwithstanding that it also devolve during the lifetime of the tenant for life by some title conferring a new succession. For example, let X. have assured land to A. for his life, with remainder to B. in fee. If B. sell his remainder in A.'s lifetime to C., C. takes subject to the liability to duty created by X.'s disposition and must satisfy this on A.'s death, the rate of duty being determined by the relationship between X. and B. (*a*). And if C. die in A.'s lifetime and the remainder which he bought be transmitted by descent or devise from him to D., D. takes subject to the original liability to succession duty as well as to the liability created by the devolution or disposition of a new succession from C. to him; and on A.'s death D. must satisfy both of these liabilities (*b*).

(*y*) *A.-G. v. Cecil*, L. R. 5 Ex. 263. It was considered that the limitation of this charge was not an alienation *pro tanto* of the remainderman's succession, but was the creation of a new and distinct interest out of it. Cf. *Wolverton v. A.-G.*, 1898, A. C.

535, 556.

(*z*) Sect. 15; above, pp. 1271, 1272.

(*a*) *Northumberland v. A.-G.*, 1905, A. C. 406, 414, 417, 418.

(*b*) See *Northumberland v. A.-G.*, 1905, A. C. 406, 409, 414 *sq.*

The result is the same if A. and B. together sell the whole fee to C., either by direct grant of their estates or by means of a joint power of appointment created by them, or if A. surrender his life estate to B. and afterwards B. sell the entire fee to C. In each case C. takes subject to the original liability to succession duty, which is not required to be discharged until the death of A., but must then inevitably be satisfied. And where in A.'s lifetime C. has bought the whole fee from A. and B. in any of the above mentioned ways and died, the property then passing from him by descent or devise to D., D. must pay succession duty at C.'s death (the estate so taken by him being in possession) on the succession, which he has acquired from C., and must again pay succession duty at A.'s death on the succession taken by B. from X. (c). And it appears that, no matter how often the property may be transmitted from C. by descent or devise in A.'s lifetime, succession duty will be payable by every successor on the succession, which he has so derived from his own immediate predecessor, and again on A.'s death in respect of the original succession acquired by B. (d). It has been decided that *alienation* in the above quoted provisions of the Succession Duty Act (e) includes voluntary or gratuitous alienation *inter vivos* (f) as well as alienation for value, and also extends to alienation conferring a new succession (g). But alienation does not here include mortgage or charge; though alienation will take place if the mortgagee foreclose or otherwise become absolute owner of the mortgaged property or sell it (h). A

A.-G. v. Northumberland.

Voluntary alienation.

(c) *A.-G. v. Northumberland*, 1903, 2 K. B. 71, affirmed 1904, 1 K. B. 762; *Northumberland v. A.-G.*, 1905, A. C. 406, overruling *Re Cooper & Allen to Harlech*, 4 Ch. D. 802.

(d) See *S. C.*

(e) Sect. 15; above, pp. 1272, 1273.

(f) See above, p. 1272.

(g) *Wolverton v. A.-G.*, 1898, A. C. 535.

(h) See Hanson, *Succession Duty*, 283, 3rd ed.; Hanson, *Death Duties*, 585, 5th ed.

“succession” may become vested in another person “by title not conferring a new succession” in case of the successor’s bankruptcy (*i*).

Where a remainder is first transmitted by title conferring a new succession and then alienated.

Let us now consider what succession duty is chargeable when during the lifetime of the tenant for life a remainder is first transmitted solely by some title conferring a new succession and is afterwards alienated or transferred by some title not conferring a new succession. Suppose in the example given above (*k*) that, in the lifetime of A., B. the original remainderman dies, without having sold his remainder and leaving D. his heir or devisee thereof, and D. afterwards sells the remainder to E. What succession duty will be payable on A.’s death? It has been suggested that E. must pay duty on D.’s succession acquired from B. and also on the succession which B. took from X. (*l*), on the alleged ground that, whenever alienation forms one link in the chain of devolution of the original remainderman’s title to the person, who ultimately becomes entitled in possession, the duty originally chargeable on the first remainderman’s succession will become payable. But this seems to be a most extraordinary result. When B. died, the original liability to duty of his succession from X. was, according to the theory of the Crown officials, discharged, because B.’s own beneficial interest never fell into possession; and there was substituted in its place a liability of D. to pay duty at A.’s death on the new succession acquired by D. from B. (*m*). If then in A.’s lifetime D. sell his remainder to E., is it not D.’s “succession” which becomes vested by alienation in E.? And if duty is to be paid in respect thereof “at the same

(*i*) See above, p. 1272; *Walterton v. A.-G.*, 1898, A. C. 535, 555; *Northumberland v. A.-G.*, 1905, A. C. 406, 414, 417.

(*k*) Above, p. 1276.

(*l*) Hanson, *Death Duties*, 588, 589, 5th ed.

(*m*) Above, p. 1274.

rate and time as if no such alienation had been made" (n), must not the duty be the same as would have been payable if D. had not sold to E., *i.e.*, what D. himself would have had to pay on A.'s death if he had not sold his remainder? If B.'s "succession" taken from X. as a piece of property taxable with succession duty, became extinct when he died before becoming entitled in possession, it seems very strange if it can afterwards be revived by an alienation by D. of the "new succession," which he took from B. The writer is not aware of any decision on this question; and he respectfully submits that the judgments given in *Lord Wolverton's* and the *Duke of Northumberland's* cases (o) show that the principle of the Succession Duty Act is that the owner of a "succession," which is to come into possession on a future death and is chargeable prospectively with succession duty payable on that death, shall not be enabled by any alienation made or act done by him *inter vivos* to defeat *such prospective liability to duty*; and that they do not warrant the conclusion that such alienation will subject the property disposed of, not only to that prospective liability, but also to an additional liability, from which it would have been exempt if no such alienation had made. To return to the example given, suppose that D., the heir or devisee of the original remainderman, instead of selling the remainder, becomes bankrupt. That would have the same effect, with respect to the liability to succession duty, as if D. had alienated the remainder (p). But can it really be the law that D.'s trustee in bankruptcy would take his remainder, not only subject to the same liability as affected it before in D.'s hands to pay a single duty on D.'s succession from B., but

(n) See above, p. 1272.

A.-G., 1905, A. C. 406, 409, 413, 415, 418.

(o) *Wolverton v. A.-G.*, 1896, A. C. 535; *Northumberland v.*

(p) See above, pp. 1272, 1276, 1277.

burdened with the liability to pay a double duty? No doubt all things are possible in the construction of the Succession Duty Act: but it is thought that the Courts would endeavour to avoid such a result as this.

Sale of a remainder after the remainderman's death under powers paramount to any new successor's title.

The case of the sale of an estate in remainder expectant on a life estate by one who has acquired it by descent or devise from the original remainderman and has so taken a new succession from him, must be distinguished from that of the sale of the remainder after the original remainderman's death, under some power, which is paramount to the title of any person acquiring the beneficial ownership of the remainder as a new succession from him. Thus if after the original remainderman's death the remainder be sold in order to pay his funeral, testamentary or administration expenses or debts, either under a trust or power for that purpose contained in his will, or under an order of the Court, or under the powers given to his legal personal representatives by the Land Transfer Act, 1897 (*q*), the official view appears to be that in all these cases his own original "succession" (and not any new succession derived from him as predecessor) is sold; so that the purchaser acquiring it through alienation will take subject to the original liability to pay succession duty at the death of the tenant for life (*r*). In this case it is obvious that, if the duty on the original succession were not payable, the Crown would receive no such duty at all; for neither legacy nor succession duty would be payable in respect of the proceeds of sale. It also seems to be the official view that duty on the original succession remains payable where the remainder is sold under a direction con-

(*q*) Above, pp. 222—230.

(*r*) Hanson, Succession Duty,

283, 3rd ed.; Hanson, Death Duties, 585, 5th ed.

tained in the remainderman's will to raise by sale money to be distributed among beneficiaries as personality (s). But this conclusion appears to be questionable; for in this event a new succession has in effect been created, the beneficiaries being chargeable, formerly with legacy duty, and now with succession duty, in respect of their interests in the proceeds of sale as upon a succession derived from the testator as predecessor (t). So that the purchaser takes, if not an actual new succession *in specie*, at least property which comes to him by a title in which the devise conferring a new succession on the beneficiaries is antecedent and is in fact a condition precedent to the alienation to him. The testator by such a devise is exercising the power of testamentary disposition incident to his own beneficial ownership; he is disposing by will of what remains to him after all his liabilities have been satisfied. This case therefore seems in principle to be different from that of an express or implied direction to sell for payment of debts, these being liabilities of the testator in his lifetime. Funeral and testamentary expenses seem to come into the same class because they are liabilities of the testator's estate, which are paramount even to his debts and *à fortiori* to any exercise by him of the power of testamentary disposition in favour of beneficiaries. If the official view be correct, the Crown obtains double succession duty in case of the devise of a remainder on trust for sale and to divide the proceeds amongst beneficiaries, but a single duty only where the remainder is devised for the beneficiaries' enjoyment *in specie* (u). Purchasers of remainders must of course have regard to the official view. The writer is not aware of any judicial decision or *dictum* on the subjects discussed in this paragraph.

(s) See previous note.

(t) See above, pp. 1258—1260.

(u) See above, pp. 1273 *sq.*

Real or leasehold property settled on trust for sale.

Personalty subject to a trust for investment in real or leasehold property.

Power to compound or commute succession duty.

To accept land in satisfaction of the duty.

The interest of any successor in moneys to arise from the sale of real or leasehold property under any trust for sale thereof, if not chargeable with legacy duty (*x*), is chargeable with succession duty as personalty; unless the moneys are subject to any trust for the re-investment thereof in the purchase of other real or leasehold property to which the successor would not be absolutely entitled, when they are chargeable with succession duty as realty (*y*). The interest of any successor in personal property (other than leaseholds), which is subject to any trusts for the investment thereof in the purchase of real or leasehold property, so far as the same is not chargeable with legacy duty, is chargeable with succession duty as personalty, if the successor would be absolutely entitled to the purchased property: but if not, then as realty (*z*).

The Commissioners of Inland Revenue are authorized to compound any succession duty payable (*a*), to receive the same in advance at a discount (*b*), and at their discretion, on application made by any person who is entitled to a succession in expectancy or would be accountable for the duty if the same were then in possession, to commute the duty presumptively payable in respect of such succession for a certain sum to be presently paid (*c*). And by the Finance (1909-10) Act, 1910 (*d*), the Commissioners may, if they think

(*x*) Above, pp. 1259, 1260.

(*y*) Stat. 16 & 17 Vict. c. 51, s. 29. In the latter case, the successor's interest is considered to be of the value of an annuity payable during the period for which he is entitled and equal in amount to the income of the trust property in its actual state of investment at the time when the successor becomes entitled in possession.

(*z*) Sect. 30. In the latter case the successor's interest is con-

sidered as equal to the value of an annuity payable during the period for which he is entitled and equal in amount to the income of the trust property in its actual state of investment at the time when the successor becomes entitled in possession.

(*a*) Sect. 39.

(*b*) Sect. 40.

(*c*) Sect. 41; stat. 43 Vict. c. 14, s. 11.

(*d*) Stat. 10 Edw. VII. c. 8, s. 56 (1). By s. 56 (2), no stamp

fit, accept in satisfaction of the succession duty payable in respect of any real or leasehold property such part of the property as may be agreed on between them and the person liable to pay the duty.

The Crown not being bound by the Statutes of Limitations as to charges on lands (*e*), its lien on any lands for succession duty was not formerly liable to be barred by lapse of time. But it is enacted by the Inland Revenue Act, 1889 (*f*), that, notwithstanding the 42nd section of the Succession Duty Act, 1853 (*g*), or any other provision contained in that Act, real property (*h*) or any estate or interest therein, shall not, as against a purchaser for valuable consideration, or a mortgagee, remain charged with or liable to payment of any sum for succession duty or temporary estate duty (*i*) after the expiration of six years from the date of notice to the Commissioners of Inland Revenue of the fact that the successor, or any person in his right or on his behalf, has become entitled in possession to his succession or to the receipt of the income and profits thereof, or from the date of the first payment by such successor or person of any instalment or part of the duty, in case the successor shall not have availed himself of the option given to him by the Inland Revenue Act, 1888 (*k*), or after two years from the time for the payment by such successor of the last instalment or part of the duty, if he has availed himself of such option, or, in the absence of any such notice or payment, after the expiration of twelve years from the happening of the

Charge of succession duty formerly not barred by lapse of time.

May now be barred as against purchasers or mortgagees.

duty is payable on any conveyance or transfer of land to the Commissioners under this section.

(*e*) Stats. 3 & 4 Will. IV. c. 27, s. 40; 37 & 38 Vict. c. 57, s. 8; Wms. Real Prop. 584, 587, 21st ed.

(*f*) Stat. 52 Vict. c. 7, s. 12 (1).

(*g*) Above, pp. 1269, 1270.

(*h*) As this enactment is in effect an amendment of sect. 42 of the Succession Duty Act, 1853, it seems that the term "real property" must here include leaseholds; see above, pp. 1260, n. *ab*, 1269, n. *ac*.

(*i*) See below.

(*k*) Above, p. 1268, n. (*o*).

event (whether before or after the passing of the Inland Revenue Act, 1889) which gave rise to an immediate claim to such duty, or if such period of twelve years expires within six years from the date of the passing of this Act, then after the expiration of six years from the last-mentioned date (*l*).

Conveyancer's duty as regards succession duty.

Descent or devise.

Where lands are settled for successive interests.

Succession duty being made a charge, as above mentioned (*m*), on the successor's interest in any real or leasehold property, the conveyancer advising on title should of course call for the production of the receipts for succession duty in every case in which it appears from the abstract that such duty became payable. In the cases of succession to land upon death and intestacy, or under a devise giving immediate possession on the testator's death, the liability to succession duty is a comparatively simple matter; as the duty then becomes payable and charged on the successor's interest directly after the death. But it must not be forgotten that, where the successor has not paid the duty on the full annual value of his succession, owing to its being subject to some prior charge, estate or interest not created by himself, the further duty to be paid on the determination of such charge, estate or interest remains as a prospective liability charged on the successor's

(*l*) By sect. 12 (2), the duty (if any) unpaid at the expiration of such period of six years or of twelve years or six years, as the case may be, shall be payable and paid by the successor or the persons mentioned as accountable in sect. 44 of the Succession Duty Act, other than the purchaser or mortgagee, and shall become charged substitutively upon any other estate or interest comprised in the succession of the successor remaining vested in him, or in any person in his right or on his behalf other than the purchaser or mortgagee, and in case of a mortgage upon the equity of

redemption. By sect. 12 (2), the above enactment is not to lessen or affect any liability of any successor or accountable person, other than the purchaser or mortgagee, to payment of duty, whether out of money received on any sale or mortgage, or otherwise: but a purchaser or mortgagee shall not, for the purpose of obtaining the exemption conferred by the above enactment, be bound to see that the duty is discharged out of the money or other consideration paid or given as the consideration for the sale or mortgage.

(*m*) Above, p. 1269.

interest (*n*). And if the successor sell his interest before the further duty has become payable, the purchaser will be entitled to require this liability to be commuted (*o*). Also on the purchase of woodlands, an undischarged liability may now exist for succession duty on the value of the growing timber, trees or wood (*p*). Where lands are settled on one for life and others in remainder, the conveyancer must always have regard, not only to the duty, if any, payable when the tenant for life came into possession, but also to that which will become payable on his death or on the death of any of the remaindermen entitled for life or in tail. As we have seen (*q*), the disposition creating the settlement gives rise to a liability to succession duty in respect of the estates limited by the settlement in remainder expectant on a death; and this liability at once attaches on such estates, as against all persons who may subsequently take them: although the liability is not required to be satisfied until the estate affected by it falls into possession. Thus the purchaser of an estate in remainder or reversion expectant on death takes subject to the liability to pay the succession duty when the estate shall fall into possession; and he cannot require the vendor, in the absence of special stipulation, to procure this liability to be discharged, the tax being regarded as an incident of the estate, not as an incumbrance (*r*). So when lands are sold by a tenant for life and remainderman in fee together, each conveying his own estate, the purchaser takes subject to the liability to succession duty on the death of the tenant for life, the time for payment of such duty not being accelerated by the merger of the life estate; and this is also the case where a tenant for

Woodlands.

Liability to duty created by the disposition.

Sale of a remainder or reversion.

Sale by tenant for life and remainderman.

(*n*) See above, pp. 1264, 1269.

(*o*) *Re Kidd & Gibbons' Contract*, 1893, 1 Ch. 695; *Re Weston & Thomas's Contract*, 1907, 1 Ch. 244; above, p. 400.

(*p*) Above, p. 1267, n. (*n*).

(*q*) Above, pp. 1260, 1261, 1272—1281.

(*r*) Above, p. 407 and n. (*e*).

life and remainderman in fee have created a joint power of appointment by grant of their estates and then conveyed to a purchaser in exercise of such power (s). In these cases, however, if the vendors simply contracted to sell an estate in fee without showing the liability to succession duty, the purchaser could require them to procure the duty to be commuted; and it has been generally allowed that the purchaser has the same right where the vendors contract together to sell him an estate in fee simple in possession, though he have notice that they are entitled as tenant for life and remainderman (t). But if they contracted as tenant for life and remainderman, each selling his own interest separately, then it seems that the purchaser would have to bear the charge of succession duty, in the absence of stipulation to the contrary (u). On the purchase (either alone or in conjunction with the particular estate) of a remainder or reversion, which is no longer vested in its original owner, regard must be had to the question, whether the property will be charged with one succession duty only on the determination of the particular estate or is affected with some further liability to duty, and to the law discussed above (x).

Sale of settled lands under a power of sale.

We have seen (y) that, where settled lands comprised in a succession are subject to a power of sale, which is exercised, any succession duty charged on the lands is to be charged substitutively on the successor's interest in all lands acquired with and interim investments of the purchase money. This provision seems to point

(s) See above, p. 1275; *A.-G. v. Northumberland*, 1903, 2 K. B. 71, affirmed, 1904, 1 K. B. 762, and 1905, A. C. 406.

(t) See *Re Kidd & Gibbons' Contract*, 1893, 1 Ch. 695, 698; Davidson, *Proc. Conv.* vol. ii. pt. i. pp. 253, n., 313, n., 4th ed.;

Dart, V. & P. 277, 593, 5th ed.; 317, 667, 6th ed.; 1233, 1234, 7th ed.; Davidson's *Concise Precedents*, 185, n., 19th ed.

(u) See above, p. 407 & n. (e), and previous note.

(x) Pp. 1271—1280.

(y) Above, p. 1270.

only to such powers of sale as were usually contained in settlements before the Settled Land Act, 1882, took effect (*z*), where the purchase money is required to be laid out in buying other lands to be settled to the same uses. On the exercise of such a power, the purchaser takes the lands free from any succession duty then actually payable and charged on any estate defeated by the exercise of the power, as where the lands are sold before payment of all the instalments of the duty payable on the succession of a tenant for life in possession. The purchaser also takes the lands free from all liability to succession duty on the death of the tenant for life or any remainderman entitled under the settlement; because, by the exercise of such a power, all the estates limited by the settlement in default of appointment under the power of sale are utterly extinguished, so that nothing is left, to be charged with duty, of any estate so limited in remainder (*a*). It was held in one case, where lands subject to a jointure rentcharge were settled with a power of sale, so that the exercise of the power could not affect the jointure, and the lands were sold under the power, that the purchaser would take free from all claims for succession duty (*b*). This decision was pronounced by a late eminent conveyancer to be manifestly wrong (*c*); and it is obvious that there was a liability to succession duty, in respect of the cesser of the jointure (*d*), and that this liability was capable of attaching not only to the estates defeated but also to those estates limited by the exercise of the power. Still the liability did affect the estates limited by the settlement in default of appointment under the

(*z*) Wms. Real Prop. 393, 394, 21st ed.

(*a*) *Re Warner's Settled Estates*, 17 Ch. D. 711, 713; and see *Ray v. Pung*, 5 B. & A. 561; *Doe d. Wigan v. Jones*, 10 B. & C. 459; *Skeeles v. Shearly*, 3 My. & Cr. 112; Sug. Pow. 478—481, 8th ed.;

A.-G. v. Selborne, 1902, 1 K. B. 388.

(*b*) *Dugdale v. Meadows*, L. R. 9 Eq. 212; 6 Ch. 501.

(*c*) Davidson, *Préc. Conv.*, vol. ii. pt. i. p. 313, 4th ed.

(*d*) See above, p. 1264.

Sale under the
Settled
Estates Act.

Sale under the
Settled Land
Act.

Trust for sale.

power of sale, although the duty was rather chargeable than actually charged thereon; and it is not altogether surprising that the judges considered that, according to the spirit of the Act, the duty in question was to be charged on the investments of the purchase money.

When settled lands are sold under the powers conferred by the Settled Estates Act, 1877, the estates limited by the settlement are defeated in like manner as if the lands had been sold under an express power of sale (*e*); and it has been held that prospective claims of succession duty are therefore charged substitutively on the investments of the purchase money to the same extent as on a sale under an express power (*f*). Sales made under the powers given by the Settled Land Act, 1882 (*g*), have the like effect of defeating the estates limited by the settlement; and the purchaser of settled land from a tenant for life selling under this Act takes it free from the prospective liability to succession duty on the death of the tenant for life, which is shifted on to the remainderman's interest in the proceeds of sale: but the official view is that such sales do not shift any charge that may be existing on the life-tenant's own interest for succession duty in respect of his own succession to the property (*h*). Where lands have been assured to trustees upon trust for sale, whether by deed or will, any succession duty, which may become payable by virtue of the disposition, will be chargeable on the successor's beneficial interests in the proceeds of sale (*i*), not on the lands assured. Any person purchasing lands from such trustees will therefore take them free from any charge of succession duty imposed on the purchase money, and appears to be under no obligation to see that any such duty is paid.

(*e*) Stat. 40 & 41 Vict. c. 18, s. 22.

(*f*) *Re Warner's Settled Estates*, 17 Ch. D. 711.

(*g*) See stat. 45 & 46 Vict. c. 38,

ss. 3, 20.

(*h*) See 35 Sol. J. 273, 274, 359, 360; 1 Key & Elph. Prec. Conv. 548, n. (*c*), 9th ed.

(*i*) Above, pp. 1269, 1282.

If, however, the persons beneficially entitled under a trust for sale of lands should elect to take the lands *in specie*, the succession duty will then become charged or chargeable on their interests in the lands; and, as no person can by his own election diminish his liability to the Crown for duty, it appears that in such cases, wherever the successor would have been liable to succession duty on the principal value of his interest in the proceeds of sale, his interest in the lands elected to be taken *in specie* will be chargeable with no less an amount of duty (*k*). Here we may observe that the discharge from succession duty given in favour of a purchaser or mortgagee by the Inland Revenue Act, 1889 (*l*), at the end of twelve years after the duty became payable, is only accorded in the absence of notice to the Commissioners or payment of part of the duty. This raises the question whether, if such notice were received or payment made towards the end or even after the expiration of the period of twelve years, the time for extinguishing the charge would not start from the date of such notice or payment (*l*). It does not appear therefore that a conveyancer advising a purchaser can safely omit to inquire as to the payment of all succession duty, which became payable more than twelve years before the contract for sale. The proper course seems to be to call for the production of the receipts for such duty in the usual way. And it is apprehended that the Act in question does not exonerate the vendor from the obligation of producing such receipts; he must prove the discharge of an incumbrance by payment, if he can. If he cannot, he may then allege that the defect is cured by a Statute of Limitations; and it will be for the purchaser's advisers to consider whether their client is protected by the Act.

Election to take *in specie* lands assumed on trust for sale.

(*k*) See *A.-G. v. Holford*, 1 Price, 426; above, p. 1282.

(*l*) Stat. 52 Vict. c. 7, s. 12 (1); above, p. 1283.

Account duty. Under the Inland Revenue Act, 1881 (*m*), as amended by the Inland Revenue Act, 1889 (*n*), certain voluntary dispositions of personal property, including leaseholds and the proceeds of sale of real estate settled on trust for sale (*o*), gave rise, on the death of the disposing party, to a liability to payment of stamp duty at the same rate as probate duty on the value of the property disposed of. These dispositions were (1) *Donationes mortis causâ* made by persons dying on or after the 1st of June, 1881 (*p*); (2) any immediate gift, at law or in equity, not made *bonâ fide* twelve months (*q*) before the donor's death; (3) any gift, whenever made, of any property, of which *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforth retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise (*r*); (4) any voluntary disposition (*s*) vesting any property in the dis-

(*m*) Stat. 44 Vict. c. 12, s. 38, passed 3rd June, 1881.

(*n*) Stat. 52 Vict. c. 7, s. 11, passed 31st May, 1889.

(*o*) *A.-G. v. Dodd*, 1894, 2 Q. B. 150.

(*p*) As to the estate duty now payable in respect of a *donatio mortis causâ*, see below, p. 1296; *Re Hudson*, 1911, 1 Ch. 206.

(*q*) Twelve was substituted for three by the Act of 1889. See *A.-G. v. Jacobs Smith*, 1895, 2 Q. B. 341. But now, in the application of these enactments to the payment of estate duty under sect. 2 (1) (*c*), (3) of the Finance Act, 1894, stat. 57 & 58 Vict. c. 30 (see below, p. 1296), and in the case of a person dying on or after the 30th April, 1909, the period of three years is to be substituted for that of twelve months before the death; except that this amendment is not to apply to any gift *inter vivos* made before the 30th April, 1908, or made for public or charitable

purposes; stat. 10 Edw. VII. c. 8, s. 59 (1).

(*r*) No. (3) was added by the Act of 1889. See *A.-G. v. Worrall*, 1895, 1 Q. B. 99. By stat. 10 Edw. VII. c. 8, s. 59 (3), in the application of this provision to the payment of estate duty under the Finance Act, 1894 (see below, p. 1297), the property shall not be deemed to pass on the death of the deceased if subsequently, by means of the surrender of the benefit reserved or otherwise, it is enjoyed to the entire exclusion of the deceased and of any benefit to him by contract or otherwise for three years preceding the death of the deceased.

(*s*) Including, by the Act of 1889, "any purchase or investment effected by the person who was absolutely entitled to the property, either by himself alone, or in concert or by arrangement with any other person." See *A.-G. v. Ellis*, 1895, 2 Q. B. 466.

poser jointly with any other person so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on the disposer's death to such other person; (5) any voluntary settlement made by deed or other instrument not taking effect as a will, whereby an interest for life or determinable by death in the property settled is expressly or impliedly reserved to the settlor, or whereby the settlor has reserved to himself the right, by the exercise of any power, to restore to himself, or to retain the absolute interest in such property (*t*); (6) any declaration of trust in favour of a volunteer made, with like reservations in the settlor's favour, in writing or otherwise, notwithstanding in the case of a deed or other instrument, that the same was made for valuable consideration as between the settlor and some person other than the volunteer (*u*); and (7) any policy of assurance effected on a donor's life, and kept up, either wholly or partly, for the benefit of a donee, whether nominee or assignee (*x*). The duty so charged was commonly called account duty; because every person, who as beneficiary, trustee or otherwise acquired possession or assumed the management of any personal property included in any of the above-mentioned voluntary dispositions, was bound to deliver to the Commissioners of Inland Revenue an account of such property, duly stamped according to the amount of duty payable, within six calendar months after the death of the disposing party; on pain, in case of default, of being liable to pay double the duty as a debt to the Crown recoverable by

(*t*) See *Crossman v. R.*, 18 Q. B. D. 256; *A.-G. v. Heywood*, 19 Q. B. D. 326; *Re Croft*, 1892, 1 Ch. 652.

(*u*) The ordinary trusts in a marriage settlement of the wife's property for her next of kin, in default of children, fall under this description: *A.-G. v. Theobald*, 24 Q. B. D. 557. See also

A.-G. v. Chapman, 1891, 2 Q. B. 526; *A.-G. v. Gosling*, 1892, 1 Q. B. 545; *A.-G. v. Jacobs Smith*, 1895, 2 Q. B. 341.

(*x*) Nos. (6) and (7) were added by the Act of 1889. No account duty was payable if the donee kept up the policy: *Lord Advocate v. Fleming*, 1897, A. C. 145.

any of the means in force for the recovery of probate, legacy or succession duties (*y*). Account duty was not otherwise charged on the property, in respect of which it might become payable: but it will be observed that purchasers acquiring possession of property subject to a claim for account duty might apparently be liable to pay the duty. By the Finance Act, 1894 (*z*), estate duty was substituted for account duty, as regards property passing on any death occurring *after* the 1st of August, 1894 (*z*).

Additional
succession
duty.

By the Inland Revenue Act, 1888 (*a*), additional succession duties were imposed on successions on deaths occurring on or after the 1st of July, 1888; except in the case of leaseholds passing by will or devolution by law, or property on which account duty was payable. These duties were abolished by the Finance Act, 1894 (*b*), as regards any property chargeable with estate duty by reason of its passing on some death occurring after the 1st of August, 1894.

Temporary
estate duty.

By the Inland Revenue Act, 1889 (*c*), a new duty, therein called estate duty, was temporarily imposed on or after the 1st of June, 1889, where the value of any property chargeable with probate or account duty exceeded ten thousand pounds, at the rate of 1*l.* per cent. on the value of such property. And the like duty was imposed, except in the case of leaseholds passing by will or devolution by law or of property on which account duty had been paid, where the value

(*y*) Stat. 44 Vict. c. 12, ss. 39, 40. Thus, the duty was payable by the donee not by the donor, or out of his estate; *Re Foster*, 1897, 1 Ch. 484.

(*z*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.

(*a*) Stat. 51 & 52 Vict. c. 8,

s. 21 (1). These duties were at the rate of 10*s.* per cent. on the succession of any lineal issue or ancestor and 1*l.* 10*s.* per cent. in other cases. See above, p. 1261, n. (*q*).

(*b*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.

(*c*) Stat. 52 Vict. c. 7, s. 5.

of any succession on the death of any person dying on or after the 1st of June, 1889, exceeded 10,000*l.*, or the value of any succession to real property under the will or intestacy of any person so dying, together with any other benefit taken by the successor under such will or intestacy, exceeded the same sum (*d*). The last mentioned duty was to be assessed and paid like succession duty, and was to be subject to the enactments relating to succession duty (*e*): but it was to be charged on the principal value of the property, to be ascertained as directed in the Act, where the successor was entitled in fee simple or in fee according to the custom of any manor, or for lives renewable under any custom or under any lease for lives, or for any estate in tail, or was entitled for life and was also competent to dispose as he should think fit of a continuing interest in the property (*f*). This duty where imposed on real property was made a first charge thereon, or on the interest of the successor therein, according as the duty was or was not chargeable on the principal value of such property (*g*). The temporary estate duties were abolished by the Finance Act, 1894 (*h*), as regards any property chargeable with the estate duty imposed by that Act by reason of its passing on some death occurring after the 1st of August, 1894.

By the Finance Act, 1894 (*i*), a new duty called Estate duty.

(*d*) Sect. 6 (1—3).

(*e*) Sect. 6 (4).

(*f*) Sect. 6 (5, *a*). The duty might be chargeable on an increase of benefit accruing to the successor and chargeable with succession duty; sect. 6 (5, *b*); see above, p. 1264.

(*g*) Sect. 6 (6).

(*h*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.

(*i*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24. This Act has been amended by stats. 59 & 60 Vict. c. 28, ss. 14—24; 61 & 62 Vict. c. 10, ss. 13, 14; 63 Vict. c. 7, ss. 11—14; 7 Edw. VII. c. 13, ss. 12—16; 10 Edw. VII. c. 8, ss. 54—64.

estate duty was imposed on the principal value (*k*) of all property, real or personal, settled or not settled,

(*k*) See stat. 57 & 58 Vict. c. 30, s. 7, amended by 10 Edw. VII. c. 8, ss. 57, 60, 61, 62. Allowance is made, as a rule, for funeral expenses, debts and incumbrances; see *Cowley v. Inland Revenue Commrs.*, 1899, A. C. 198; *A.-G. v. Montagu*, 1904, A. C. 316. But allowance shall not be made (a) for debts incurred by the deceased or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bonâ fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest; see *Re Gray*, 1896, 1 Ch. 620; *Re Maryon-Wilson*, 1900, 1 Ch. 565; *Re Hackett*, 1907, 1 Ch. 385; *A.-G. v. Richmond*, 1909, A. C. 466; nor (b) for any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained; nor (c) more than once for the same debt or incumbrance charged upon different portions of the estate; nor (d) for any debt or incumbrance incurred or created in whole or in part for the purpose of or in consideration for the purchase or acquisition or extinction, whether by operation of law or otherwise, of any interest in expectancy (see below, p. 1299, n. (*h*)) in any property passing or deemed to pass on the death of a person dying on or after the 29th April, 1910, where the person whose interest in expectancy is so purchased, acquired or extinguished, becomes, under any disposition made by, or through devolution of law from, or under the intestacy of the deceased, entitled to any interest in that property; and in such case any property charged with such debt or incumbrance shall be deemed to pass freed therefrom; provided that, if part only of such debt or incumbrance was so incurred or created, this provision shall apply to that part only, and if the person whose interest in expectancy is so purchased, &c. becomes entitled to an interest in part only of that property, this provision shall apply only to a part of the debt or incumbrance proportionate to the value of that part of that property as compared with the value of the whole of that property. This last provision was enacted in consequence of the decision in *A.-G. v. Richmond*, *ubi sup.* By stat. 10 Edw. VII. c. 8, s. 61, sub-s. 5, where an estate in respect of which estate duty is payable on the death of a person dying after the passing of the Act (29th April, 1910) comprises land on which timber, trees or wood are growing, the value of such timber, trees or wood shall be aggregated (see below, p. 1305) with the other property passing on the death of the deceased for the purpose of determining the value of the estate and the rate of estate duty, but the estate duty which, but for this sub-section, would be payable on the principal value of the timber, trees or wood shall not be payable thereon, but shall at the rate so ascertained be payable on the net moneys (if any, after deducting all necessary outgoings since the death of the deceased) which may from time to time be received from the sale of the timber, trees or wood, when felled, during the period which may elapse until the land on the death of some other person again becomes liable, or would, but for this sub-section, have become liable to estate duty, and the owners or trustees of such land shall account for and pay the same accordingly as and when such moneys are received with interest at the rate of three per cent. per annum from the date when such moneys are received: provided that if at any time the timber, trees and wood are sold, either with or apart from the land on which they are growing, the amount of estate duty on the principal value thereof which, but

Estate duty
on timber.

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which passes on the death of any person dying after the 1st of August, 1894; and it was provided that probate duty, account duty, additional succession duty, temporary estate duty and legacy or succession duty at the rate of 1*l.* per cent. (*l*) should not be levied in respect of property chargeable with such new estate duty. But as above noted, legacy and succession duty at the rate of 1*l.* per cent. have since been re-imposed, subject to the exemptions mentioned in the Finance (1909-10) Act, 1910 (*m*). By the Act of 1894, property (*n*) passing on the death (*o*) of a person so dying shall be deemed to include (1) property of which the deceased was at the time of his death competent to dispose (*p*); (2) pro-

for this sub-section, would have been payable on the death of the deceased, after deducting the amount (if any) of estate duty paid in respect of the timber, trees or wood under this sub-section since that date, shall become payable. Purchasers of land with timber, trees or wood growing thereon must have regard to this liability, and should require any unpaid estate duty so charged on the land (see below, p. 1307) in respect of the timber, &c. to be discharged by the vendor before completion of the sale.

(*l*) Above, pp. 1257, 1262, n. (*q*), 1292, 1293.

(*m*) Stat. 10 Edw. VII. c. 8, s. 58 (2-4); above, p. 1262, n. (*q*).

(*n*) The expression "property" includes real and personal property and the proceeds of sale thereof respectively, and any money or investment for the time being representing the proceeds of sale; stat. 57 & 58 Vict. c. 30, s. 22 (1, *f*).

(*o*) The expression "property passing on the death" includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and the expression "on the death" includes "at a period ascertainable only by reference to the death"; sect. 22 (1, *l*).

(*p*) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui*

juris, enable him to dispose of the property, including a tenant in tail, whether in possession or not; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos*, or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life under the Settled Land Act, 1882, or as mortgagee: sect. 22 (2, *a*). A disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required; sect. 22 (2, *b*). And money which a person has a general power to charge on property shall be deemed to be property of which he has power to dispose; sect. 22 (2, *c*).

perty in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest (*q*); but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office (*r*), or recipient of the benefits of a charity, or as a corporation sole; (3) property which would be required on the death of the deceased to be included in an account under sect. 38 of the Customs and Inland Revenue Act, 1881, as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, if those sections extended to real as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom (*s*); and (4) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased (*t*). Property passing on the death of the deceased when situate out of the United Kingdom shall be included only if, under the law in force before the passing of

(*q*) As to the value of such a benefit for the purposes of the duty, see sect. 7 (7): *Adv.-Gen. v. MacLachlan*, 1900, W. N. 204.

(*r*) See *A.-G. v. Eyres*, 1909, 1 K. B. 723, where an annuity given to a trustee while acting as such was held to give him an interest only as holder of an office.

(*s*) See above, p. 1290 & nn. (*q*, *r*), and note the amendments made by stat. 10 Edw. VII. c. 8, s. 59; *Grey v. A.-G.*, 1900, A. C. 124; *A.-G. v. Johnson*, 1903, 1 K. B. 617; *A.-G. v. Holden*, 1903, 1 K. B. 832. By stat. 10 Edw. VII. c. 8, s. 59 (2), so much of s. 2 (1) of the Finance Act, 1894, and of this enacting section as makes gifts *inter vivos* property which is

deemed to pass on the death of the deceased shall not apply to gifts which are made in consideration of marriage, or which are proved to the satisfaction of the commissioners to have been part of the normal expenditure of the deceased and to have been reasonable, having regard to the amount of his income or to the circumstances, or which, in the case of any donee, do not exceed in the aggregate 100*l.* in value or amount.

(*t*) Stat. 57 & 58 Vict. c. 30, s. 2 (1). See *A.-G. v. Hawkins*, 1901, 1 K. B. 285; *A.-G. v. Murray*, 1904, 1 K. B. 165; *Lethbridge v. A.-G.*, 1907, A. C. 19.

the Finance Act, 1894, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes (*u*).

Estate duty is not payable under the Finance Act, 1894, in the following cases:—(1) In respect of property held by the deceased as trustee for another person, under a disposition not made by the deceased, or under a disposition made by the deceased more than three years before his death, where possession and enjoyment of the property was *bonâ fide* assumed by the beneficiary immediately upon the creation of the trust and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise (*x*). (2) In respect of property passing on the death of the deceased by reason only of a *bonâ fide* purchase from the person under whose disposition the property passes, or in respect of the falling into possession of the reversion on any lease for lives, or in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee (*y*). (3) In respect of the

Exemptions
from estate
duty.

1. Trust property.

2. Transactions for money consideration.

(*u*) Stat. 57 & 58 Vict. c. 30, s. 2 (2); see above, p. 1252, n. (*q*); Wms. Pers. Prop. 452 and n. (*p*), 16th ed.; *A.-G. v. Jewish Colonization Assn.*, 1901, 1 Q. B. 123. This enactment exempts from the duty lands situate out of the country and passing as such (that is, in an unconverted state) on the death, whatever the form of tenure may be: but not the money secured by mortgage of lands abroad or the money which such lands represent, if converted in equity; *Lawson v. Commrs. of Inland Revenue*, 1896, 1 R. 418; W. N. 1896, p. 145; *Forbes v.*

Steven, L. R. 10 Eq. 178; *A.-G. v. Johnson*, 1907, 2 K. B. 885; Hanson, *Death Duties*, 123, 5th ed.

(*x*) Sect. 23, as amended by stat. 10 Edw. VII. c. 8, s. 59 (1), substituting three years for twelve months; see above, pp. 1290 & nn. (*q*, *r*), 1296.

(*y*) Stat. 57 & 58 Vict. c. 30, s. 3 (1); see *Lethbridge v. A.-G.*, 1907, A. C. 19. Where such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or bene-

3. Property of common seamen, &c. property of common seamen, marines, or soldiers, who are slain or die in the King's service. (4) In respect of sums under 100*l.* payable without requiring representation (*z*). (5) In respect of a single annuity not exceeding 25*l.*, purchased or provided by the deceased for the life of himself and of some other person and the survivor of them or to arise on his own death in favour of some other person (*a*). (6) If the Treasury remit the duty, as they lawfully may, in respect of such pictures, prints, books, manuscripts, works of art or scientific collections as appear to the Treasury to be of national, scientific or historic interest and to be given or bequeathed for national purposes, or to any university or to any county council or municipal corporation (*b*). (7) In respect of any pension or annuity payable by the Government of British India to the widow or child of any deceased officer of such Government (*c*). (8) In respect of any advowson or church patronage which would be free from succession duty (*d*). (9) Where the principal value of the estate does not exceed 100*l.* (*e*). (10) In respect of personal property settled by a will or disposition made by a person dying before the 2nd of August, 1894, in respect of which property probate or account duty has been paid or is payable; unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property (*f*); but for the pur-
4. Sums under 100*l.* payable without representation.
5. Single annuity of 25*l.*
6. Objects of national, scientific, or historic interest given for national purposes, &c.
7. Indian Government pensions.
8. Advowson.
9. Estates not exceeding 100*l.*
10. Property settled by disposition of one dying before 2nd August, 1894, if probate or account duty paid or payable.

fit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty; sect. 3 (2). See *A.-G. v. Smith-Marriott*, 1899, 2 Q. B. 595; *A.-G. v. Johnson*, 1903, 1 K. B. 617.

(*z*) Sect. 8 (1); see Hanson, *Death Duties*, 186—189, 5th ed.

(*a*) Sect. 15 (1). If there is more than one such annuity, the annuity first granted is alone entitled to the exemption.

(*b*) Sect. 15 (2).

(*c*) Sect. 15 (3).

(*d*) Sect. 15 (4); see above, p. 1268, n. (*n*).

(*e*) Sect. 17, now replaced by stat. 10 Edw. VII. c. 8, s. 54.

(*f*) Stat. 57 & 58 Vict. c. 30, s. 21 (1); *A.-G. v. Dodington*, 1897, 2 Q. B. 373; *A.-G. v.*

pose of any claim to relief from estate duty under this provision in the case of persons dying on or after the 30th April, 1909, payment of or liability to duty, whether the payment was made or the liability attached before, on or after that date, shall not be deemed to be a payment of or liability to duty in respect of settled property if the payment was made or the liability attached, in respect of an interest in expectancy in any property on the death of a person other than the settlor (*g*). (11) Where an interest in expectancy (*h*) in any property has, before the 2nd of August, 1894, been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession, than would have been payable if this Act had not passed; and in the case of a mortgage, any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee (*i*). (12) Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the 2nd of August, 1894, and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, estate duty

11. Where interest in expectancy sold or mortgaged before 2nd August, 1894.

12. Settlement by husband or wife on the other of them before 2nd August, 1894.

Londesborough, 1905, 1 K. B. 98; see above, p. 1295, n. (*p*). By the Finance Acts, 1896 and 1907 (stats. 59 & 60 Vict. c. 28, s. 21; 7 Edw. VII. c. 13, s. 15), where estate duty becomes payable in respect of any property passing under a settlement made before the 2nd August, 1894, and before that date additional succession duty, temporary estate duty, or legacy or succession duty at the rate of one per cent. has been paid or become payable under the instrument creating the settlement on the capital value of the property, the deduction

therein provided on account of any such duty is to be allowed from the estate duty payable.

(*g*) Stat. 10 Edw. VII. c. 8, s. 55.

(*h*) This expression includes an estate in remainder or reversion and every other future interest whether vested or contingent, but does not include reversions expectant upon the determination of leases; stat. 57 & 58 Vict. c. 30, s. 22 (*l, j*).

(*i*) Stat. 57 & 58 Vict. c. 30, s. 21 (*3*). See *Re Vernon*, 1901, 1 Q. B. 297; above, pp. 407, 408 & n. (*f*).

13. Property passing in more ways than one on the same death.

14. Reversion to settlor on settlement on himself for life and others, if falling in while settlor entitled in possession.

15. Reversion on disposition to another or others for life, if falling in in disponent's lifetime.

shall not be payable in respect of that property until the death of the survivor (*k*). (13) Estate duty in respect of property passing on any death shall not be more than once levied on the same death (*l*). The following cases of exemption were added by the Finance Act, 1896 (*m*), with regard to deaths occurring on or after the 1st of July, 1896, namely:—

(14) Where property is settled by a person on himself for life, and after his death on any other persons with an ultimate reversion of an absolute interest or absolute power of disposition to the settlor, no estate duty is payable in respect of the enlargement of the settlor's interest by reason of the death of any such other person while the settlor remains in possession of the property as tenant for life (*n*). (15) Where by a disposition of any property an interest is conferred on any person other than the disponent for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disponent or of any benefit to him by contract or otherwise, and the only benefit which the disponent retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, no estate duty is payable on the death of such person in the disponent's lifetime by reason only of the property reverting to the disponent (*o*); and the law is the same where a similar disposition is made in favour of two or more

(*k*) Sect. 21 (5); held not to apply where the survivor becomes entitled to the capital of the property settled; *A.-G. v. Strange*, 1898, 2 Q. B. 39; see also *A.-G. v. Glossop*, 1906, 1 K. B. 284, 290 *sq.*, *affd.* 1907, 1 K. B. 163.

(*l*) Stat. 57 & 58 Vict. c. 30, s. 7 (10). This provision may take effect where property is settled on A. for life, then on B.

for life and then on C. absolutely, and A. in B.'s lifetime acquires C.'s interest by succession after C.'s death and dies.

(*m*) Stat. 59 & 60 Vict. c. 28, s. 24.

(*n*) Sect. 14; see *A.-G. v. Glossop*, 1907, 1 K. B. 163, 177.

(*o*) Sect. 15 (1); see *A.-G. v. Glossop*, 1907, 1 K. B. 163.

persons, either severally or jointly or in succession (*p*): but this exemption is not given if the person or persons taking such life or determinable interests had at any time prior to the disposition been competent to dispose of the property (*q*). (16) No estate duty is payable where a husband entitled by law to the rents and profits of his wife's real or leasehold property dies in her lifetime (*r*). (17) Where any property passing on the death of a deceased person consists of such pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income as appear to the Treasury to be of national, scientific, or historic interest, and is settled so as to be enjoyed in kind in succession by different persons, such property shall, while enjoyed in kind by a person not competent to dispose of the same, be exempt from estate duty: but if such property be sold or come into the possession of some person competent to dispose of the same (*s*), it will become liable to estate duty (*t*). This exception was extended by the Finance (1909-10) Act, 1910 (*u*), in the case of any person dying on or after the 30th April, 1909, so as to take effect whether the property in respect of which the exemption is given is settled or not, and as if the reference to national, scientific or historic interest included a reference to artistic interest; and it was provided that the duty shall only become chargeable when the property is sold, and then only in respect of the last death on which the property passed. (18) By the Finance Act, 1900 (*x*), where any person dies from wounds inflicted, accident occurring, or disease contracted, within twelve months before death, while on active service against

16. On death of husband entitled to wife's real or leasehold property in her lifetime.

17. Objects of national, scientific, historic or artistic interest.

18. Persons killed in war.

(*p*) Sect. 15 (2).

(*q*) Sect. 15 (3); see above, p. 1295, n. (*p*).

(*r*) Sect. 15 (4).

(*s*) See above, p. 1295, n. (*p*).

(*t*) Sect. 20.

(*u*) Stat. 10 Edw. VII. c. 8, ss. 63, 96 (1) and Third Schedule.

(*x*) Stat. 63 Vict. c. 7, s. 14, which is to take effect in the case of any person dying since the 11th Oct. 1899.

an enemy, whether on sea or land, and was, when the wounds were inflicted, the accident occurred, or the disease was contracted, either subject to the Naval Discipline Act or subject to military law, whether as an officer, non-commissioned officer, or soldier, under Part V. of the Army Act, the Treasury may, if they think fit, on the recommendation of the Secretary of State or of the Admiralty, as the case requires, remit, or in the case of duty already paid repay, up to an amount not exceeding 150*l.* in any one case, the whole or any part of the death duties (*y*) leviable in respect of property passing upon the death of the deceased to his widow or lineal descendants if the total value for the purpose of estate duty of the property so passing does not exceed 5,000*l.*

Settled property.

Where property in respect of which estate duty is leviable, is settled (*z*) by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property (*a*), a further estate duty (called settlement estate duty (*b*)) on the principal value of the settled

Settlement estate duty.

(*y*) *I.e.*, estate, legacy, and succession duty, and also probate, account, additional succession and temporary estate duty.

(*z*) Settlement estate duty is payable where property is settled contingently only; *A.-G. v. Fairley*, 1897, 1 Q. B. 698; *A.-G. v. Clarkson*, 1900, 1 Q. B. 156; *Smith v. Lord Advocate*, 1902, W. N. 167. But by the Finance Act, 1898, where in the case of a death occurring on or after the 1st July, 1898, settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen and cannot arise, the said duty so paid shall be repaid; stat. 61 & 62

Vict. c. 10, s. 14. Property is settled within the meaning of the Finance Act, 1894, when it is made subject to a disposition which would be a settlement within the meaning of the Settled Land Act, 1882; stats. 45 & 46 Vict. c. 38, s. 2; 57 & 58 Vict. c. 30, s. 22 (1, *h*, *i*); see *A.-G. v. Owen*, 1899, 2 Q. B. 253; *Re St. Albans*, 1900, 2 Ch. 873; *Re Campbell*, 1902, 1 K. B. 113.

(*a*) See above, p. 1295, n. (*p*).

(*b*) Settlement estate duty is not payable in respect of property settled by a disposition which has taken effect before the 2nd August, 1894; stat. 57 & 58 Vict. c. 30, s. 21 (4); or in respect of property settled by a

property shall be levied, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but during the continuance of the settlement the settlement estate duty shall not be payable more than once (*c*). The rate of settlement estate duty was originally one per cent., but was raised to two per cent. in the case of persons dying on or after the 30th of April, 1909 (*d*). If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property (*e*), and who, if on his death subsequent limitations under the settlement take effect in respect of such property, was *sui juris* at the time of his death or had been *sui juris* at any time while so competent to dispose of the property (*f*). But for the purpose of any claim to relief from estate duty under these provisions in the case of persons dying on or after the 30th April, 1909, payment of or liability to duty, whether the payment was made or the liability attached before, on or after that date shall not be deemed to be a payment of or liability to duty in

will, where the net value of the property, on which estate duty is leviable (exclusive of property settled otherwise than by the will) does not exceed 1,000*l.*, and the fixed duty or estate duty has been paid thereon; sect. 16 (3); stat. 10 Edw. VII. c. 8, s. 58 (2); see above, p. 1262, n. (*g*).

(*c*) Stat. 57 & 58 Vict. c. 30, s. 5 (1).

(*d*) Stat. 10 Edw. VII. c. 8, s. 54, replacing 57 & 58 Vict. c. 30, s. 17. By stat. 57 & 58 Vict. c. 30, s. 5 (4), the amount of the *ad valorem* stamp duty, if any, charged on the settlement in respect of the settled property

may be deducted from the settlement estate duty payable.

(*e*) See above, p. 1295, n. (*p*).

(*f*) Stat. 57 & 58 Vict. c. 30, s. 5 (2), amended by stat. 61 & 62 Vict. c. 10, s. 13. See *A.-G. v. Hay*, 1899, 2 Q. B. 245; *Commrs. of Inland Revenue v. Prestley*, 1901, A. C. 208. This exemption originally extended to legacy and succession duty at the rate of one per cent., but it appears that such duty is now payable under the Finance (1909-10) Act, 1910, in the cases and with the exemptions therein provided; stat. 10 Edw. VII. c. 8, s. 58; see above, p. 1261, n. (*g*).

respect of settled property if the payment was made or the liability attached in respect of an interest in expectancy (*g*) in any property on the death of a person other than the settlor (*h*). In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death (*i*). Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of the Finance Act, 1894, with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty (*k*). Settlement estate duty leviable in respect of a legacy or other personal property settled by will is payable out of the settled legacy or property in exoneration of the rest of the testator's estate; unless the will contain an express provision to the contrary (*l*).

Rate of estate duty. The rate of estate duty is now graduated according

(*g*) Above, p. 1299, n. (*h*).

(*h*) Stat. 10 Edw. VII. c. 8, s. 55.

(*i*) Stat. 57 & 58 Vict. c. 30, s. 5 (3); *A.-G. v. Wood*, 1897, 2 Q. B. 102; *A.-G. v. Glasseop*, 1907, 1 K. B. 163.

(*k*) Sect. 5 (5); *Re Bolton Estates Act* (1863), 1904, 1 Ch. 289; above, pp. 1267—1269.

(*l*) Stat. 59 & 60 Vict. c. 28, s. 19 (1), reversing the rule in

Re Webber, 1896, 1 Ch. 914; held not retrospective, *Re Gibbs*, 1898, 1 Ch. 625; but see *Re Maryon-Wilson*, 1900, 1 Ch. 565; *Re St. Albans*, 1900, 2 Ch. 873. Such settlement estate duty does not come under the head of testamentary expenses; *Re King*, 1904, 1 Ch. 363. As to "an express provision to the contrary," see *Re Cayley*, 1904, 2 Ch. 781; *Re Turnbull*, 1905, 1 Ch. 726.

to the value of the estate as stated in the note (*m*); and for determining the rate of duty to be paid, all property passing on the death of the deceased and chargeable with estate duty is required, as a rule, to be aggregated so as to form one estate (*n*).

The executor or administrator of the deceased is required to specify in appropriate accounts all the property in respect of which estate duty is payable upon the death of the deceased, and is accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but is not liable for any duty in excess of the assets which he has received as executor or administrator or might but for his own neglect or default have received (*o*). Where property passes on the death of the deceased, and his executor or administrator is not accountable for the estate duty in

Persons accountable for estate duty.

(*m*, Where the principal value of the Estate

At the
Rate per cent. of

Exceeds	£100 and does not exceed	£500	1
"	500	1,000	2
"	1,000	5,000	3
"	5,000	10,000	4
"	10,000	20,000	5
"	20,000	40,000	6
"	40,000	70,000	7
"	70,000	100,000	8
"	100,000	150,000	9
"	150,000	200,000	10
"	200,000	400,000	11
"	400,000	600,000	12
"	600,000	800,000	13
"	800,000	1,000,000	14
"	1,000,000	15

See stat. 10 Edw. VII. c. 8, s. 54 and Second Schedule, replacing 7 Edw. VII. c. 13, s. 12; 57 & 58 Vict. c. 30, s. 17.

(*n*) See stats. 57 & 58 Vict. c. 30, ss. 4, 7 (10), 15 (2), 16 (3), 20 (1); 63 Vict. c. 7, ss. 12, 13; 7 Edw. VII. c. 13, s. 16.

17; 59 & 60 Vict. c. 28, ss. 17, (o) Stat. 57 & 58 Vict. c. 30, s. 8 3.

respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property (*p*): but a *bonâ fide* purchaser for valuable consideration without notice is not rendered liable to or accountable for duty (*q*).

Estate duty
when payable.

Estate duty in respect of all personal property of which the deceased person was competent to dispose (*r*) at his death is payable by his executor or administrator on delivering the affidavit necessary to obtain probate or administration; and the estate duty on any other property passing on the death may be paid by the executor or administrator at the same time, if the property be under his control by virtue of any testamentary disposition of the deceased or if the persons accountable for the duty so request (*s*). Otherwise the duty on such other property is to be collected upon an account setting forth the particulars of the property and to be delivered to the Commissioners by the person accountable for the duty within six months after the death or within such further time as the Commissioners may allow (*t*). But where an estate includes an interest in expectancy (*u*), estate duty in respect of that interest may be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into

(*p*) Sect. 8 (4).

(*q*) Sect. 8 (18).

(*r*) See above, p. 1295, n. *p*.

(*s*) Stat. 57 & 58 Vict. c. 30, s. 6 (2); see also sect. 14.

(*t*) Sect. 6 (4).

(*u*) See above, p. 1299, n. (*h*).

possession (*x*). Interest at the rate of three per cent. per annum is payable on the estate duty from the date of the death up to the date of the delivery of the affidavit or account or the expiration of six months after the death, whichever first happens (*y*). The duty to be collected upon an affidavit or account as before mentioned becomes due on the delivery thereof or on the expiration of six months from the death, whichever first happens (*z*). But the duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments, or sixteen half-yearly instalments, commencing at the end of one year from the death, with interest at the rate of three per cent. per annum, as from the time of payment of the first instalment, on the amount of duty for the time being remaining unpaid. The duty for the time being unpaid may however be paid at any time, with interest to the date of payment; and in case the property is sold, the duty and interest shall be paid on completion of the sale or shall be duty in arrear (*a*). Under the Finance Act, 1896 (*b*), the estate duty on annuities may be paid by four yearly instalments commencing at the end of a year from the death.

Estate duty
on real
property.

A rateable part of the estate duty on an estate in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a *bonâ fide* purchaser thereof for valuable con-

Charge of
estate duty.

(*x*) Sect. 7 (6). If payment be delayed till the interest falls into possession, the duty will then be payable on its value as an interest in possession; *Re Eyre*, 1907, 1 K. B. 331.

(*y*) Sect. 6 (5), amended by

stat. 59 & 60 Vict. c. 28, ss. 18, 40.

(*z*) Stat. 57 & 58 Vict. c. 30, s. 6 (7).

(*a*) Sect. 6 (8), amended by stat. 59 & 60 Vict. c. 28, s. 40.

(*b*) Stat. 59 & 60 Vict. c. 28, s. 16.

Power to raise the money. consideration without notice (*e*). A person authorized or required (*d*) to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof by the sale or mortgage of or a terminable charge on that property or any part thereof (*e*). And a person having a limited interest in any property, who pays the estate duty in respect of that property shall be entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him (*f*).

Charge in favour of limited owner paying the estate duty.

Certificate of discharge from estate duty.

The Commissioners of Inland Revenue, on being satisfied that the full estate duty has been or will be paid in respect of an estate or any part thereof, shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for estate duty the property shown by the certificate to form the estate or part thereof, as the case may be (*g*). And where a person accountable for the estate duty in respect of any property passing on a death applies to the Commissioners, and delivers to them and verifies a full statement to the best of his knowledge and belief of all property passing on such

(*e*) Stat. 57 & 58 Vict. c. 30, s. 9 (1). See *Re Parker-Jervis*, 1898, 2 Ch. 643; *Re St. Albans*, 1900, 2 Ch. 873. The charge so created has been described as an equitable charge by Cozens-Hardy, L. J., *Re Hole*, 1906, 1 Ch. 673, 682, and Joyce, J., *Re Bowerman*, 1908, 2 Ch. 340, 343: but it is respectfully submitted that, being created by a statute, of which all Courts (whether exercising legal or equitable jurisdiction) must take notice, it confers

a legal interest on the Crown; see *Lord Advocate v. Moray*, 1905, A. C. 531, 537, 541, 542.

(*d*) See above, pp. 1305, 1306.

(*e*) Sect. 9 (5); see *Re Parker-Jervis*, 1898, 2 Ch. 643, 648, 658; *Re Howe's Settled Estates*, 1903, 2 Ch. 69.

(*f*) Sect. 9 (6); see *Lord Advocate v. Moray*, 1905, A. C. 531, 539, 541, 542.

(*g*) Stat. 57 & 58 Vict. c. 30, s. 11 (1).

death and the several persons entitled thereto, the Commissioners may determine the rate of the estate duty in respect of the property for which the applicant is accountable, and on payment of the duty at that rate, that property and the applicant so far as regards that property shall be discharged from any further claim for estate duty, and the Commissioners shall give a certificate of such discharge (*h*). Any certificate given as above mentioned shall not discharge any person or property from estate duty in case of fraud or failure to disclose material facts (*i*): but any such certificate purporting to be a discharge of the whole estate duty payable in respect of any property included in the certificate shall exonerate a *bonâ fide* purchaser for valuable consideration without notice from the duty, notwithstanding any such fraud or failure (*k*).

The Commissioners are authorized in their discretion, upon the application of a person entitled to an interest in expectancy (*l*), to commute the estate duty, which would or might become payable in respect of such interest (*m*). And where it is difficult to ascertain exactly the amount of death duties (*n*) or any of them payable in respect of any property or any interest therein, the Commissioners are authorized, on the application of any person accountable for any duty thereon, to accept a sum to be assessed by them in full discharge of all claims for death duties in respect of such property or interest (*o*). By the Finance (1909-10) Act, 1910 (*p*), the Commissioners may, if they think fit, accept in

Commutation of estate duty on interest in expectancy.

Composition for any death duties.

Power to accept land in satisfaction of the duty.

h) Sect. 11 (2), as amended by stat. 7 Edw. VII. c. 13, s. 14.

i) Stat. 57 & 58 Vict. c. 30, s. 11 (3).

k) Sect. 11 (4).

l) See above, p. 1299, n. (*h*).

m) Stat. 57 & 58 Vict. c. 30, s. 12.

n) This includes all the duties mentioned above, p. 1302, n. (*y*); sect. 13 (3).

o) Sect. 13 (1).

p) Stat. 10 Edw. VII. c. 8, s. 56 (1). By s. 56 (2), no stamp duty is payable on any conveyance or transfer of land to the Commissioners under this section.

satisfaction of any estate duty or settlement estate duty payable in respect of any real or leasehold property such part of the property as may be agreed on between them and the person liable to pay the duty.

Estate duty
as compared
with succes-
sion duty.

It will have been observed that estate duty, like succession duty, becomes payable on the death of any person in respect of the property devised or bequeathed by his will or devolving by reason of his intestacy, and also on the death of any person entitled as tenant for life (*q*) or otherwise (for instance, as grantee of a rent-charge for life (*r*)) under a settlement in respect of the beneficial interest to which any other person succeeds on such death (*s*). But there is a marked difference between succession duty and estate duty in this; that the liability to succession duty is created by the disposition, whereby one becomes beneficially entitled to property on the death of another, whilst estate duty is charged in respect of the passing of property on a death (*t*). This causes a substantial distinction in the case of a settlement. Thus when lands are settled for successive estates for life or in tail, with an ultimate remainder in fee, succession duty is at once prospectively charged on the various beneficial interests limited to take effect on the deaths; and the liability to succession duty is not affected by the merger of any life estate (*u*). Estate duty, however, is not in any way charged on property so settled until it passes on some death. It was therefore held that, under the Finance Act, 1894, if the estate of a tenant for life under a settlement ceased in his lifetime by merger or other-

q; It has been held that in this case the property passes on the death of the tenant for life to the remainderman, and estate duty is payable under sect. 1 of the Finance Act, 1894, and not under sect. 2 (*l*, *b*) as on property in which the deceased had an inte-

rest ceasing on his death; *Cowley v. Inland Revenue Commrs.*, 1899, A. C. 198.

(*r*) See *Lord Advocate v. Mac-lachlan*, 1900, W. N. 204.

(*s*) See above, p. 1296.

(*t*) Above, pp. 1260, 1295.

(*u*) Above, pp. 1263, 1272.

wise, no estate duty would be payable on his death (*x*). But the rule so laid down was modified by the Finance Act, 1900 (*y*), whereby in the case of every person dying after the 31st of March, 1900, property, whether real or personal, in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased should, for the purpose of the Finance Act, 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that that estate or interest had been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was *bonâ fide* made or effected twelve months before the death of the deceased, and *bonâ fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise (*z*). And by the Finance (1909-10) Act, 1910 (*a*), the above-mentioned period of twelve months was in the case of a person dying on or after

(*x*) *A.-G. v. Borch*, 1899, A. C. 53; *A.-G. v. De Pécille*, 1900, 1 Q. B. 223.

(*y*) Stat. 63 Vict. c. 7, s. 11.

(*z*) See above, pp. 1290, 1296.

(*a*) Stat. 10 Edw. VII. c. 8, s. 59 (1); see above, pp. 1290, nn. (*q*, *r*), 1296. By s. 59 (3), where property affected by such a surrender, assurance, divesting, or disposition as aforesaid is deemed to be property passing on the death of the deceased by reason only that the property was not, as from the date of the surrender, assurance, or divesting, retained to the entire exclusion of the

deceased or a person who had an estate or interest limited to cease on the death of the deceased, and of any benefit to him by contract or otherwise, the property shall not be deemed to pass on the death of the deceased if subsequently, by means of the surrender of the benefit reserved or otherwise, it is enjoyed to the entire exclusion of the deceased or such other person as aforesaid, and of any benefit to him by contract or otherwise, for such period preceding the death of the deceased as is provided by this section.

Estate duty
on sale of
lands under
a power.

the 30th of April, 1909, extended to three years; except as regards any surrender, assurance, divesting or disposition made or effected before the 30th of April, 1908, or for public or charitable purposes. Again, estate duty, where made a charge, is charged on the property, in respect of which it is leviable (*b*): while succession duty is charged only on the successor's interest therein (*c*). And there is no provision similar to that made with regard to succession duty (*d*) and charging estate duty on the proceeds of sale of settled property sold under a power of sale. It appears, therefore, that if lands settled on one for life with remainder over be sold, either under a power of sale contained in the settlement, or under the Settled Estates Act, 1877, or the Settled Land Acts, and any unpaid estate duty be charged thereon, the purchaser must require this duty to be paid: otherwise the same will remain charged on the lands. For although the estate of those claiming under the settlement is destroyed by the exercise of the power (*e*), yet the charge given by the Finance Act, 1894, appears to be a charge on the lands, which is paramount to any estate therein of any subject of the Crown. When therefore the lien of the Crown for estate duty has attached on any lands, it appears to remain, until discharged by payment, so long as any subject has any estate therein; thus it would affect all estates created by the exercise of any express or statutory power, or arising on the escheat of the lands to any mesne lord (*f*). But as no estate duty, which may become payable on a future death, is charged on any lands, a purchaser of lands settled on one for life with remainder over will take the lands free from any charge in respect

(*b*) Above, p. 1307.

(*c*) Above, p. 1269.

(*d*) Above, p. 1270.

(*e*) Above, pp. 1287, 1288.

(*f*) Cf. *Ellis v. R.*, 6 Ex. 921; Sug. V. & P. 521; and cases cited above, p. 236, n. (*a*).

of the estate duty, if any (*g*), which will become payable on the death of the tenant for life; and this appears to be the case whether the lands be conveyed to him under an express or a statutory power or by the tenant for life and remaindermen according to their estates therein (*h*). But if a remainder or reversion expectant on the determination of a life interest, other than a lease for lives (*i*), be sold, by itself and apart from the life interest, after the commencement of the Finance Act, 1894 (*k*), estate duty will become payable in respect of the property on the death of the tenant for life; and it appears that the purchaser will take subject to this liability, and must bear the expense of the duty, in the absence of stipulation to the contrary (*l*). The provisions of the Inland Revenue Act, 1889, barring the charge of succession duty after a certain lapse of time, in favour of a purchaser or mortgagee (*m*), are by the Finance Act, 1894 (*n*), directed to apply as if estate duty were therein mentioned as well.

On sale of remainder or reversion.

Charge of estate duty as against purchaser.

The Finance Act, 1894, does not make estate duty a charge upon property which passes to the executor or administrator as such (*o*); so that estate duty is not a charge on any personal estate, which belonged absolutely to a deceased person and passes by his will or upon his intestacy, including leaseholds (*p*) and his equitable interest transmissible as personalty in any real estate, which was prior to his death absolutely

Estate duty not charged on property passing to executor, as such.

Leaseholds.

(*g*) See above, pp. 1310, 1311.

(*h*) See *Cochly v. Inland Revenue Commrs.*, 1899, A. C. 198.

(*i*) See above, p. 1297.

(*k*) See above, p. 1295.

(*l*) See above, pp. 407, 408 & n. (*f*).

(*m*) Above, pp. 1283, 1289.

(*n*) Stat. 57 & 58 Vict. c. 50, s. 8 (1); see Hanson, *Death Duties*, 189—192, 5th ed.

(*o*) Above, pp. 1307, 1308.

(*p*) *Re Cutlerhouse*, 1896, 2 Ch. 251, deciding that the estate duty leviable in respect of leaseholds specifically bequeathed is payable out of the testator's general personal estate; and see *Re Clemenov*, 1900, 2 Ch. 182, 194—196; cf. *Porte v. Williams*, 1911, 2 Ch. 188; *Re Hudson*, ib. 206, 212 sq.

converted in equity into personal property (*q*). It will be remembered that the estate duty on such property is payable before the grant of probate or administration (*r*). The Court of Appeal has decided, after an extraordinary conflict of opinion on the part of judges of first instance, that personalty appointed by will in exercise of a general power of appointment passes to the executor *as such*, and is so freed from any charge of estate duty (*s*). The Finance Act, 1894, of course made estate duty a charge on all real estate passing by will or on intestacy (*t*). And it has been decided that in this respect the law has not been altered by the Land Transfer Act, 1897, under which a deceased person's real estate passes, as a rule, to his executors or administrators, like a chattel real, and such personal representatives have the same power to dispose of real estate as they have of chattels real (*u*). That Act provides that nothing in Part I. thereof shall affect any duty payable in respect of real estate (*x*). Executors or administrators, who are now accountable as trustees (*y*) of any real estate vested in them under the Act for the estate duty leviable in respect thereof (*z*), are not therefore required to pay such estate duty before obtaining a grant of probate or administration, but have the option of paying the duty by instalments (*a*). And the duty is not payable out of the

(*q*) *I.e.*, any interest in real estate so converted on which probate duty was formerly payable; above, p. 1256.

(*r*) Above, p. 1306.

(*s*) *Re Hadley*, 1909, 1 Ch. 20, reversing *Parker, J.*, and overruling on this point *Re Treasure*, 1900, 2 Ch. 648, *Re Maddock*, 1901, 2 Ch. 372 (both *Kekewich, J.*), *Re Power*, 1901, 2 Ch. 659 (*Byrne, J.*), and *Re Dodson*, 1907, 1 Ch. 284 (*Warrington, J.*), and following *Re Moore*, 1901, 1 Ch. 691, *Re Dixon*, 1902, 1 Ch. 248, 257 (both *Buckley, J.*), *Re Fearn-*

sides, 1903, 1 Ch. 250 (*Swinfen Eady, J.*), and *Re Orlebar*, 1908, 1 Ch. 136 (*Neville, J.*).

(*t*) Above, p. 1307.

(*u*) Above, pp. 228—232; *Re Palmer*, 1900, W. N. 9; *Re Sharman*, 1901, 2 Ch. 280.

(*x*) Stat. 60 & 61 Vict. c. 65, s. 5.

(*y*) Above, p. 1305.

(*z*) *Re Adams*, *Kekewich, J.*, 3rd Aug. 1898, A. 592, cited *Brickdale & Sheldon's Land Transfer Acts*, 271, 2nd ed.

(*a*) *Re Sharman*, 1901, 2 Ch. 280, 283; see above, p. 1307.

deceased person's general personal estate, as in the case of leaseholds, but ought to be satisfied out of the real estate itself (*b*), the persons beneficially entitled to the land devised (*c*) or descended bearing the actual burden of payment according to their interests therein (*d*). As estate duty still remains a charge on any real estate devised by will or descending upon death and intestacy, a purchaser thereof, whether from the deceased tenant's executors or administrator (*e*), or from the devisee or heir, should require the duty to be entirely discharged by the vendor before completing the sale (*f*). We may notice that, if the deceased person's estate were insolvent, no estate duty would be chargeable on his own property (*g*).

Lands devised on trust for sale appear to be charged under the Finance Act, 1894, with the estate duty payable in respect thereof on the testator's death (*h*). Where lands have been settled by deed on trust for

Lands devised on trust for sale.

Lands settled by deed on trust for sale.

(*b*) *Re Sharman*, 1901, 2 Ch. 280, 283; *Re Hackett*, 1907, 1 Ch. 385; *Re Spencer Cooper*, 1908, 1 Ch. 130; *Re Stamford & Warrington*, 1910, 2 Ch. 83. The estate duty payable in respect of a testator's realty is not a "testamentary expense" within the meaning of a direction to pay his testamentary expenses out of his residuary personalty or a mixed fund of residuary realty and personalty; *Re Sharman*, *Re Spencer Cooper*, *ubi sup.*

(*c*) See above, pp. 229, 1305—1307.

(*d*) See *Re Jolley*, 17 Times L. R. 244; *Re Packer-Jones*, 1898, 2 Ch. 643; *Re St. Albans*, 1900, 2 Ch. 873, 881; *Re Hackett*, *Re Spencer Cooper*, *Re Stamford & Warrington*, *ubi sup.*

(*e*) Above, p. 232. The Inland Revenue authorities at first considered that a sale of real estate by the personal representatives conveyed the same free from any

charge of duty: but afterwards they asserted the contrary opinion; see 41 Sol. J. 308; 43 Sol. J. 765, 769, 812, 822; 44 Sol. J. 67, 72, 339, 343. There seems to be no doubt that the latter opinion is correct. An executor can sell leaseholds or other personalty free from any charge of duty, even before probate; above, pp. 231, n. (*n*), 1257: but that is because probate duty was not and estate duty is not made a charge on such property. The Finance Act, 1894, contains no provision shifting the duty on a sale; and the Crown is not bound by the Land Transfer Act, 1897: above, pp. 236, 1312.

(*f*) See above, p. 1307; and as to the duty on timber, trees or wood, above, p. 1294, n. (*k*).

(*g*) Above, pp. 1267, n. (*n*), 1294, n. (*k*).

(*h*) See 43 Sol. J. 765, 769; 108 L. T. Newspaper, 450.

sale, so as to be converted in equity into money, and the proceeds of sale have been directed to be held in trust for one for life and others in succession, no estate duty is charged on the lands before the tenant for life dies; so that if a sale be made before such death, the purchaser takes the lands free from any claim of duty (*i*). If, however, the lands remain unsold until the death of the tenant for life, the estate duty becomes leviable, for which the trustees would be accountable (*k*). And as the Finance Act provides that the duty shall be a first charge on the property in respect of which it is leviable (*l*), it appears to be a charge on the lands. For until the lands be sold, what other property is there on which the duty can be a charge? It must be remembered too that in such cases the *cestui-que-trusts* are entitled usually by express declaration (*m*), but, if not, by implication (*n*), to the rents and profits of the lands until sale for the like estates as they enjoy in the income of the proceeds of sale. So that on the death of the tenant for life the property passes, or must be deemed to pass, as there is a cesser of an actual interest in the lands. It is this event which causes the liability to duty (*o*); and the person next entitled succeeds to a like interest in the lands until sale. These considerations also support the view that the duty is a charge on the lands (*p*). It is thought, therefore, that on a purchase of land from trustees for sale, where the purchaser has notice that some person is dead, who was or might have been beneficially interested for his life in the rents and profits until sale (as where land has been settled on marriage in trust for sale with the husband's consent and he is dead), the purchaser is entitled to have

(*i*) See above, p. 1310.

(*k*) Above, p. 1305.

(*l*) Above, p. 1307.

(*m*) Williams on Settlements, 125.

(*n*) *Casamajor v. Strader*, 19 Ves. 390, n.

(*o*) Above, p. 1295.

(*p*) As to the official view, see above, p. 1315, n. *g*.

the trusts of the purchase money sufficiently abstracted to show whether any charge of estate duty has attached thereon; and if it appear from such abstract that some person entitled for life under these trusts is dead, the purchaser should inquire as to payment of any estate duty leviable on such death and require it to be discharged. If however the purchaser have no notice of the death of any person, who was or might have been beneficially interested for life in the rents and profits until sale, it is thought that he may rely on the provisions of the Finance Act, 1894, that estate duty is not to be charged on property as against a *bonâ fide* purchaser thereof for valuable consideration without notice (*q*); and that he need not require the trusts of the purchase money, which form no part of his title, to be abstracted. As we have seen (*r*), when an equitable interest in lands settled on trust for sale passes to the executor or administrator *as such*, there is no charge of estate duty either on the proceeds of sale or on the land itself.

It has been mentioned (*s*) that by the Finance Act, 1894, property passing on death is to be deemed to include property of which the deceased was at the time of his death competent to dispose by virtue of any estate or interest therein, or any general power exercisable by instrument *inter vivos* or by will, or both. If, therefore, any lands, whether freehold, copyhold or leasehold, be subject to a general power of appointment, which has not been validly exercised by instrument taking effect in the appointor's lifetime and in such a way as not to confer an interest arising on or by reference to the appointor's death (*t*), estate duty will be leviable in respect thereof on the appointor's

Lands subject to a general power of appointment.

(*q*) Above, p. 1307.

(*r*) Above, p. 1314.

(*s*) Above, p. 1295, n. (*p*).

(*t*) Above, p. 1295, n. (*o*).

death, whether he have exercised the power by his will or have not exercised it at all (*u*). In the case of real estate, such duty will be charged on the property (*x*). In the case of leaseholds the duty will be charged on the property, if the power were not exercised (*y*); but if it were, it is now held that, as we have seen (*z*), the property passes to the executor as such, and so escapes the charge of duty. And money which a person has a general power to charge on property is to be deemed property of which he has power to dispose (*a*). This liability to estate duty must especially be borne in mind on the purchase from any person entitled in default of appointment to land made subject to a general power which has been extinguished by the appointor's death, whether the power were to appoint the land generally or to charge the same with the payment of money. Any property, whether real or personal, which is subject to a special power of appointment is chargeable with estate duty when it passes or is to be deemed to pass on death, either by virtue of an exercise of the power or in default of appointment (*b*): but not, as a rule, merely on account of the death of the appointor without exercising the power (*c*). If, however, the appointor were himself an object of the power, so that he could have appointed to himself some beneficial interest exceeding

General power to charge land with the payment of money.

Property subject to a special power.

(*u*) *Cowley v. Inland Revenue Commrs.*, 1899, A. C. 198, 213; *Porte v. Williams*, 1911, 1 Ch. 188.

(*x*) Above, pp. 1307, 1313; *Porte v. Williams*, *ubi sup.*

(*y*) See *Porte v. Williams*, *ubi sup.*

(*z*) Above, p. 1314. It appears that, where the power is exercised, the estate duty in respect of any personalty so appointed is a testamentary expense; *Re Treasure*, 1900, 2 Ch. 648, 653, which has not been overruled (see above,

p. 1314) on this point; *Re Fearnside*, 1903, 1 Ch. 250, 258; but this is not the case where the power is not exercised; *Porte v. Williams*, *ubi sup.*; *Re Hudson*, 1911, 1 Ch. 206, 213.

(*a*) Above, p. 1295, n. (*p*).

(*b*) See above, p. 1295.

(*c*) It does not appear that in this case the appointor or any person to whom he might have appointed would have had an interest in the property ceasing on the death of the deceased; see above, p. 1296.

an estate for his own life in the property, it appears that estate duty will be leviable on his death although he should have made no appointment, for he was at the time of his death competent to dispose of the property for his own benefit; and where a man is empowered to appoint to himself, he has in effect a general power of disposition, since he may appoint to himself and then alien to any other person (*d*). Where a man has exercised a power of appointment or made any settlement or other disposition of property reserving a power of revocation, which is exercisable in his own favour, he appears to be competent to dispose of the property within the meaning of the Finance Act, 1894 (*e*), and estate duty is therefore chargeable on his death, if he die without exercising the power.

General power
of revocation.

The reader may be reminded that estate duty is now payable on the death of any joint tenant beneficially entitled (*f*). And where a devise or bequest to any child or other issue dying in the lifetime of a testator is saved from lapse and takes effect by virtue of sect. 33 of the Wills Act (*g*), estate duty is payable, not only on the passing of the property by the testator's death, but also on the further devolution of the property from the dead child or issue to those who become entitled thereto under his will or intestacy (*h*). Estate duty is also leviable on the cesser by death of a contingent interest in any property to the extent to which any benefit thereby accrues or arises (*i*). As we have seen (*k*), estate duty is, as a rule, payable on the death of any tenant for life or life annuitant under a settle-

Death of joint
tenant.

Devise to
issue dying in
testator's
lifetime.

Cesser of
contingent
interest.

Death of life
tenant under
settlement
made before
the Finance
Act, 1894.

d See above, p. 1295, and n. (*p*).

e Above, p. 1295; see also pp. 1291, 1295, as to settlements reserving a power of revocation.

f See above, p. 1296.

g Stat. 7 Will. IV. & 1 Vict. c. 26.

h *Re Scott*, 1901, 1 K. B. 228.

i Above, p. 1296; *A.-G. v. Wood*, 1897, 2 Q. B. 102, 105—107.

k Above, pp. 1298, 1310, 1316.

ment of whatever date; but if the settlement were made before the commencement of the Finance Act, 1894, estate duty is not payable (*l*) in respect of any personal property comprised therein on which probate or account duty has been paid, until the death of some person who was competent to dispose thereof. Thus, if realty and personalty, including leaseholds, were settled together by the will of a testator, who died before the Act, and a tenant for life or life annuitant under the settlement die after the Act, estate duty will be payable in respect of the settled realty only (*m*).

Estate duty,
how borne as
between those
beneficially
entitled.

Where any property, real or personal, is charged with estate duty, the charge is in general upon the inheritance or *corpus* thereof; the executors or administrators, or the trustees, or else the persons beneficially entitled in possession (as the case may be), are accountable for and must pay or procure payment of the duty (*n*); but, as we have seen (*o*), the ultimate burden of payment is borne by the persons beneficially entitled in proportion to their respective interests. Thus, where estate duty becomes charged on land which is comprised in a settlement charging a jointure rent-charge and portions and subject thereto limiting a life estate with remainders over, the charge is upon the inheritance and is paramount to all these interests; but the payment of the capital sum leviable for estate duty falls upon the portioners and the remainderman in fee in proportion to the amount of the portions and the value of the land, whilst the interest payable in respect of the duty, if paid by instalments (*p*), and of any mortgage or charge neces-

(*l*) Save in the cases contemplated by the amending stat. 10 Edw. VII. c. 8, s. 55; above p. 1299 & n. (*f*).

(*m*) *Berry v. Gaukroger*, 1903,

2 Ch. 116; *A.-G. v. Londeshborough*, 1905, 1 K. B. 98.

(*n*) Above, pp. 1305—1308.

(*o*) Above, p. 1315.

(*p*) Above, p. 1307.

sary to raise the duty must be paid by the jointress and tenant for life proportionately, the jointress being treated as tenant for life of such a portion of the land (as valued for the purposes of the duty) as would produce an income equal to the amount of her jointure (*q*). And where any persons entitled to any annuity or capital sum charged on any property are so bound to bear the burden of any estate duty, the amount with which they are chargeable in respect of the duty may be deducted by the person accountable therefor before payment to them of the annuity or capital sum (*r*). This must be borne in mind in all dealings by such persons with their annuities or capital sums so charged, whether by way of sale or mortgage. As already mentioned (*s*), any person authorised or required to pay any estate duty may raise the amount necessary by sale or mortgage of the property. And in the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary (*t*). Where any sum so charged is expressly made payable without any deduction, the person in whose favour the same is

(*q*) *Re Parker-Jervis*, 1898, 2 Ch. 643; *Re St. Albans*, 1900, 2 Ch. 873; *Re Howe's Settled Estates*, 1903, 2 Ch. 69; *Berry v. Gaukrøger*, 1903, 2 Ch. 116; *Re Hackett*, 1907, 1 Ch. 385. So where real and personal estate is devised on trust for sale and out of the proceeds to pay legacies, that proportion of the legacies which is payable out of the proceeds of the realty must bear a rateable part of the estate duty;

Re Spencer Cooper, 1908, 1 Ch. 130. See also *Re Stamford & Warrington*, 1910, 2 Ch. 83. The like law prevails with regard to settlements of personalty; *Re Orford*, 1896, 1 Ch. 257; *Re Menrick*, 1897, 1 Ch. 99; *Re St. Albans*, *ubi sup.*

(*r*) *Re St. Albans*, 1900, 2 Ch. 873, 881.

(*s*) Above, p. 1308.

(*t*) Stat. 57 & 58 Vict. c. 30, s. 14 (1). *re Hartland 911 Ch.*

charged is not bound to bear any portion of the estate duty, which will then fall entirely on those interested in the property subject to the charge (*u*).

Where the property passing on death is not the whole estate or interest.

If the property which passes on the death be not the whole estate or interest in some land or chattel, as where an equity of redemption only so passes, the estate duty is charged on that property only, and not on the paramount estate or interest, such as the estate of the mortgagee (*x*). And there can be no doubt that in the example given the mortgagee exercising his power of sale could convey the property to a purchaser free from any charge of the estate duty which became payable in respect of the passing on death of the equity of redemption (*y*). So if an estate in remainder or reversion pass on death, that estate only appears to be chargeable with the estate duty, which is payable, at the option of the person accountable therefor, either immediately or when the estate falls into possession (*z*).

Certificate of discharge should be required.

Whenever any estate duty has become charged on any property, an intending purchaser or mortgagee thereof should require the production of a certificate of discharge of the duty (*a*), such certificate (and not the certificate of payment of (*b*) or the receipts for the

(*u*) *Re Parker-Jervis*, 1898, 2 Ch. 643; *Re Fitzhardinge*, 80 L. T. 376; *Re Maryon-Wilson*, 1900, 1 Ch. 565.

(*x*) See *Cowley v. Inland Revenue Commrs.*, 1899, A. C. 198; *A.-G. v. Montagu*, 1904, A. C. 316.

(*y*) See *R. v. Lamb*, 13 Pri. 649.

(*z*) See stat. 57 & 58 Vict. c. 30, ss. 5 (2), (3), 7 (6), 22 (1) (j); above, pp. 1308, 1309. It is a question whether, if land be settled on A. for life with remainder to B. in fee, and B. die before A., and his heir or devisee elect not to pay the estate duty until A.'s death, the land can in A.'s lifetime be conveyed free from the charge of estate duty on a sale

either by A. under the Settled Land Acts or in exercise of a power of sale contained in the settlement. It appears on principle that, if the duty be indeed charged on B.'s estate only, the land should, on a sale under either power, be freed therefrom and the charge shifted to the interest of B.'s heir or devisee in the proceeds of sale; above, pp. 1286, 1287 & n. (*a*); unless the application of the ordinary rule is excluded by the doctrine of the prerogative of the Crown; see *Ellis v. R.*, 6 Ex. 921, 926.

(*a*) See above, p. 1308.

(*b*) See stat. 57 & 58 Vict. c. 30, s. 9 (2).

duty) being the right evidence that the property is freed from the charge (c). It should be noted, however, that even a certificate of discharge is no evidence that the property is free from all incumbrance in respect of estate duty. As above stated (d), where a person having a limited interest in any property pays the estate duty in respect thereof, he will be entitled *to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him*. It has been held that this charge arises by the mere fact of such payment of the duty, and further that it confers a legal and not only an equitable interest on the chargee (e). It is necessary, therefore, on every sale or mortgage of land which has become chargeable with estate duty, not only to inquire whether the duty has been paid (f), but also to ascertain that there is no charge subsisting by reason of the duty having been paid by a person who had a limited interest in the land.

Charge where
duty paid by
person having
a limited
interest.

It has been mentioned (g) that by the Finance (1909-10) Act, 1910 (h), a new duty called Increment Value Duty was charged on the increment value of any land, and made payable, amongst other occasions, on the occasion of the death of any person dying after the commencement of the Act, where the fee simple of the land or any interest in the land (i) is

Increment
Value Duty
payable on
death.

(c) 1 Key & Elph. Prec. Conv. 471, n., 8th ed.

(d) Above, p. 1308.

(e) See *Re Laurie*, 1898, W. N. 136; *Lord Advocate v. Moray*, 1905, A. C. 531, 539, 541, 542.

(f) Above, pp. 174, 1256.

(g) Above, pp. 705—710, 713, n. (p).

(h) Stat. 10 Edw. VII. c. 8, s. 1 (b), passed 29th April, 1910; above, p. 706 & n. (d). See also ss. 2 (2, c), 3, 14 (4), 22 (as to minerals leased or worked), 36, 62; and as to the exemptions from

such duty, ss. 7—10, 35, 38, above, p. 706, n. (c). By s. 11, where a building is used for the purpose of separate tenements, flats or dwellings, the passing on death of any lease of any such separate tenement, flat or dwelling is not an occasion on which increment value duty is to be collected under this Act; see above, pp. 706, 707 & n. (g), 709.

(i) As to the meaning of the words *land*, *interest* and *fee simple* in this part of the Act, see s. 41; above, p. 706, n. (e).

comprised in the property passing on the death of the deceased within the meaning of the enactments cited below of the Finance Act, 1894 (*k*), as amended by any subsequent enactment. By the Finance Act of 1910 (*l*), the provisions as to the assessment, collection and recovery of estate duty under the Finance Act, 1894 (*m*), shall apply as if increment value duty to be collected on the occasion of the death of any person were estate duty; but, where any interest in land (*n*) in respect of which increment value duty is payable is property passing to the personal representative as such (*o*), the duty shall be payable out of that interest in land in exoneration of the rest of the deceased's estate, and shall be collected upon an account to be delivered by the personal representative, setting forth the particulars of the increment value in respect of the property; provided that in respect of all property of the deceased, other than that assessed to increment value duty, the Crown shall, as a creditor in respect of such increment value duty, rank *pari passu* with the other creditors of the deceased. It appears that the above-mentioned provisions of the Finance Act, 1894 (*p*), include the enactment making the duty in respect of any property, which does not pass to the executor as such, a charge thereon (*q*). It is thought, therefore, that purchasers of land must have regard to any increment value duty which may be so charged thereon, and should require their vendors to discharge any such duty before completion of the sale. And it appears further that, as regards any interest in land (*r*) capable of passing to the personal representative as such (*e.g.* leaseholds (*r*)), a purchaser of such

(*k*) Stat. 57 & 58 Vict. c. 30, ss. 1, 2 (1, *a*, *b*, *c*, 3); see above, pp. 1295, 1296.

(*l*) Stat. 10 Edw. VII. c. 8, s. 5.

(*m*) These appear to be stat. 57 & 58 Vict. c. 30, ss. 6—10.

(*n*) See above, n. (*l*).

(*o*) See above, pp. 1307, 1308, 1313, 1314.

(*p*) See above, n. (*m*).

(*q*) Stat. 57 & 58 Vict. c. 30, s. 9 (1); above, pp. 1307, 1308.

(*r*) See above, n. (*i*).

property must require proof that any increment value duty, which has become payable in respect thereof has been duly discharged; as the duty is payable out of that interest in exoneration of the rest of the deceased's estate (*s*).

By the Finance (1909-10) Act, 1910 (*t*), where the fee simple of any land, or any interest in land (*u*) in respect of which increment value duty or reversion duty (*x*) is charged, is settled land within the meaning of the Settled Land Act, 1882, or is vested in a trustee, and the tenant for life, or persons having the powers of a tenant for life, or the trustee, is the person who is liable to pay any sums on account of either of these duties, he shall be entitled to charge by deed upon the land or interest in land any amount paid by him, or which he may then be or may thereafter become liable to pay, in respect of either of these duties, and the amount of any expenditure which he may have reasonably incurred in connection with the valuation, and the benefit of any such charge, may be transferred in like manner as a mortgage (*y*). In the case of settled land a deed executed for the purposes of this section shall not take effect until notice thereof has been given to the trustees of the settlement for the purposes of the Settled Land Act, 1882 (*z*). Where the fee simple of any land, or any interest in land (*a*) in respect of which increment value

Power to charge increment value duty or reversion duty on land settled or vested in trustees.

(*s*) Above, p. 1324.

(*t*) Stat. 10 Edw. VII. c. 8, s. 39.

(*u*) See above, p. 1323, n. (*i*).

(*x*) See above, pp. 401, 705—712, 714, n.

(*y*) Sect. 39, sub-s. 1. By sub-s. 3, sects. 59, 60 and 62 of the Settled Land Act, 1882 (which relate to the exercise of powers

on behalf of infants and lunatics), shall apply to the exercise of the power under this section in the same manner as they apply to the exercise of the powers of a tenant for life under that Act; see above, pp. 878 & n. (*d*), 895 & n. (*u*).

(*z*) Sect. 39, sub-s. 3.

(*a*) See above, p. 1323, n. (*i*).

duty or reversion duty is charged, is vested in a mortgagee who is liable to pay any sum on account of either of those duties, he shall be entitled to add to his security the sum for which he is so liable, including any costs or expenses properly incurred by him in respect of the payment of the duty (*b*).

Charge for
increment
value duty
payable on
a sale.

The construction of the above provisions gives rise to difficulty in the case of increment value duty payable on the occasion of a transfer on sale (*c*). The power is to charge the amount paid for duty on "the land," which according to the wording of the Act appears to mean the land previously referred to, that is, the land in respect of which the duty is charged. This, of course, would in the above case be the land *sold*. It is thought, however, that the Courts will not construe the enactment as enabling the land sold to be so charged with the duty in the purchaser's hands. Where a part only of land settled or vested in trustees is sold, the Court may possibly consider that the Act empowers the duty to be charged on the land remaining unsold: but it would not be satisfactory for an intending transferee of the charge to advance money on the assumption that the Act will be so construed, without an actual decision to this effect. When the whole of land settled or vested in trustees is sold, the further question arises whether the above enactment enables the duty to be charged on the purchase money. If this should be so decided, it might be held that on the sale of part of such land, the duty ought to be charged exclusively on the proceeds of the sale. Possibly it may be considered that, on general principles and having regard to the provisions of the Finance Act of 1910 (*d*), and in the case of settled land to the provisions of the Settled Land Act,

(*b*) Sect. 39, sub-s. 4.

(*d*) Stat. 10 Edw. VII. c. 8,
ss. 1, 4, 39; above, pp. 705—712,
1325.

c, See above, pp. 705, 706 *sq.*

1882 (*e*), as to payments to be made out of capital money, the payment of increment value duty on a transfer on sale is now a necessary expense incidental to the sale of land, and is therefore properly payable out of the proceeds of sale when the land sold was settled or vested in trustees. If so, there would be no occasion to construe the above enactment as conferring a power to charge with the increment value duty payable on a transfer on sale any land retained by the vendor and held subject to the same settlement or on the same trusts as the land sold. It will be observed that the enactment above quoted (*f*) enables a charge to be given prospectively for the amount of duty which the chargor may thereafter become liable to pay. When such a prospective charge is given by a tenant for life or by a person having the powers of a tenant for life under the Settled Land Acts, it appears that it could be displaced by his conveyance of the settled land under the power of sale or any of the other powers given to him by the Settled Land Act, 1882 (*g*), except so far as it had become a security for any money actually raised or paid for duty at the date of the deed of conveyance. Money might be so raised or paid for the increment value duty chargeable on the transfer on the sale. Purchasers of settled land so prospectively charged from the tenant for life or a person with the powers of a tenant for life selling under the Settled Land Acts must therefore ascertain if any money has actually been raised or paid under the charge before the date of the conveyance of the land to them; and if so, they must obtain an express release of the charge from the person so entitled to the benefit thereof (*h*). Where such a pro-

Prospective
charge of
such duty.

(*e*) Stat. 45 & 46 Vict. c. 38, s. 20; see above, pp. 306, 307, ss. 21 (*x*), 22 (*5*).

(*f*) Above, p. 1325.

(*g*) Stat. 45 & 46 Vict. c. 38,

317 *sq.*

(*h*) See above, pp. 327—331.

pective charge has been created by a trustee, who subsequently sells the land so charged and proposes to convey it by virtue of his estate therein or some express power thereover, the purchaser should equally inquire whether any money has been raised or paid and is owing on the security of the charge; and he should require the charge to be expressly released, whether any money has actually been raised or secured thereunder or not. For if the vendor were entitled to the charge for his own use to secure the repayment of money paid out of his own pocket, but subject thereto held the land and would take the purchase money as trustee, a question might arise whether his conveyance of the land without expressly releasing the charge would vest the land in the purchaser free from the charge (*i*).

(i) See above, p. 649 and cases cited in n. (o).

APPENDIX (A).

Referred to above, pages 82, 83, 244, 269, 386, 712.

FORM OF CONDITIONS OF SALE BY AUCTION OF FREEHOLD AND LEASEHOLD PROPERTY IN LOTS (a).

GENERAL CONDITIONS OF SALE.

(Applicable to all the Lots.)

1. The amount of the advance of each bidding shall be regulated by the auctioneer, and no bidding shall be retracted (b). There will be a reserve price for each lot; and the vendor reserves the right to bid in person or by

Bidding;
reserve price
right to bid
reserved.

(a) These conditions are intended to be annexed to particulars of sale describing the various lots, and specifying any easements or other rights, of which the purchasers are to take the benefit or bear the burthen, and which are intended to affect or enure for the benefit of other lots or other property of the vendor: see above, pp. 70, 639—643.

Lots 1 to 120 are in Yorkshire, and form part of large settled estates, of which the vendor is tenant for life. Lots 121 to 259 are unregistered land in the county of London, and belong to the vendor absolutely, Lots 121 to 199 being freehold, and the rest leasehold; and Lots 251 to 259 being held by underlease. The mines and minerals under

Lots 1 to 20 are excepted, and proper working powers reserved; Lots 21 to 40 are sold subject to a rent-charge; and Lots 41 to 120 are sold as building lots, and made subject to restrictive conditions. All the conditions of sale are adapted from forms settled by the author for use in actual practice, which have passed through the ordeal of the auction mart.

The conditions are, of course, drawn exclusively in the vendor's interest: see above, pp. 75, 87. Some of these conditions are in the same form as those contained in the conditions of sale by auction settled by the author for the Solicitors' Law Stationery Society, Limited, and are re-produced here by their permission.

(b) See above, pp. 20, 57.

agent as often as he may please (*c*), to consolidate any two or more lots into one, to divide any lot into two or more lots, to vary the order of the lots and to withdraw any lot (*d*). Subject to the rights so reserved to the vendor, the highest bidder for each lot shall be the purchaser. If any dispute shall arise respecting a bidding, the property shall be put up again and resold.

Deposit;
contract to
be signed.

2. Each purchaser shall immediately after the sale pay a deposit of 10*l.* per cent. of his purchase-money into the hands of [*the auctioneer or the vendor's solicitors*], and sign the subjoined agreement (*e*).

Time limited
for making
requisitions
on title, &c.

3. Each purchaser shall send his requisitions and objections (if any) in respect of the title and all matters appearing on the abstract, particulars or conditions, to the office at No. —, ——— Street, ———, of Messrs. ———, the vendor's solicitors, within fourteen days after the day of the delivery of his abstract; and in default of or subject only to any such requisitions and objections so made, the purchaser shall be taken to have accepted the title. All further requisitions or objections arising out of any reply by the vendor to any of the purchaser's requisitions shall be delivered within seven days after the delivery of such reply. For the purpose of the stipulations made in this condition, time shall be of the essence of the contract, and the abstract shall be deemed to be perfect (though otherwise defective) if it supply the information suggesting any requisition or objection (*f*).

Reservation
to vendor of
right to
rescind the
contract.
Identity.

4. If any purchaser shall insist [*continue as in clause 6, above, p. 72, substituting seven for ten days as the time within which the requisition must be withdrawn*] (*g*).

5. Each purchaser shall admit the identity of the lot purchased by him with the property or part of the property comprised in the muniments offered by the vendor as the title to such lot, upon the evidence afforded by a comparison of the descriptions contained in the particulars of sale and

(*c*) See above, pp. 22, 23, 56, 57.

(*d*) See above, pp. 25, 26.

(*e*) See above, pp. 26, 57.

(*f*) See above, pp. 62, 63.

(*g*) See above, pp. 64, 65.

in the muniments; and the vendor shall not be required to point out or distinguish the descriptions of any lot or lots now offered for sale in, amongst or from any description or descriptions contained in the muniments of any larger property; and no objection shall be taken or requisition made on the ground of any difference or discrepancy, as to quantity or otherwise, between the description contained in the particulars of sale and any description contained in the said muniments or any of them, or with respect to any encroachment appearing to have been made (*h*).

6. Each lot is sold subject to all chief, quit and other rents, outgoings and incidents of tenure, heriots, rights of way, water, drainage, light and other easements and public rights of way, or other rights (if any) affecting the same (*i*), and to the reservation as legal easements or rights of all privileges or quasi-easements now or heretofore used or enjoyed thereover in respect of any adjoining property of the vendor, whether comprised in the present sale or not (*k*), and to any subsisting liability to repair party walls, fences, roads, or streets, and to all leases, tenancies, or occupations, whether mentioned in the particulars or not, and to all rights or claims of lessees, tenants, or occupiers (*l*). The vendor shall not be required to define the easements or other privileges or public rights to which any lot is subject, and the purchaser of any lot shall take no objection on account of any easement or privilege or public right known to the vendor not being mentioned in the particulars (*i*). Every wall or fence standing between any two lots, or between any lot and any other property of the vendor, and now used and maintained as or in the nature of a party wall or fence (of which fact the vendor or his agent shall be the sole judge), shall be deemed to be a party wall or fence (*l*).

Property sold
subject to
easements,
tenancies, &c.

Reservation
of easements.

Party walls.

7. Each lot is sold, and if the vendor shall so require shall be conveyed, with the benefit of or subject to all reservations, conditions, or other stipulations (if any) made

Property sold
and to be
conveyed
subject to

(*h*) See above, p. 65.

(*k*) See above, pp. 642, 643.

(*i*) See above, pp. 73 and n. (*t*),
175, 176, 641—646.

(*l*) See above, pp. 178, 430.

stipulations
in particulars
or conditions.

with respect thereto in the particulars or the general or special conditions of sale, and effect shall be given to all such reservations, conditions, or stipulations in such manner as the vendor's counsel shall determine (*m*). If any lot shall not be sold at the present sale, the vendor shall (except as otherwise provided in the special conditions) stand in the place of the purchaser of such lot.

No compensation for errors of description.

8. Each lot is believed and shall be taken to be correctly described as to quantity and otherwise. If any error, mis-statement or omission shall be discovered in the particulars, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect thereof (*n*).

Vendor not selling by plan.

9. The plans annexed to the particulars are only furnished for the purpose of illustration of the descriptions contained in the particulars, and the vendor does not sell, and shall not be required to convey, according or by reference to those plans, and no objection or requisition shall be made on account of any inaccuracy therein (*o*).

Purchasers to have notice of the state of the property.

10. Every purchaser shall be deemed to buy with full notice of the actual state and condition of each lot in all respects, whether as to quantity, state of repair or otherwise howsoever, and shall take the property purchased by him as it is (*p*).

Purchasers to take subject to all liabilities under notices by local authorities, &c.

11. If by reason of any notice served, demand, requirement or order made, or resolution passed by any local or other authority or Court, under any statute or otherwise, whether before or after the present sale, but before the completion thereof, any legal liability, whether present or prospective, shall have been or shall be imposed upon the owner or occupier for the time being of any lot or property sold, or any part thereof, to execute thereon or on any adjoining or neighbouring land any improvement, repairs, demolitions or other works of any kind, or to pay for or contribute to the cost of any improvement, repairs, demolitions or works executed or to be executed on such lot or

(*m*) See above, pp. 613—616,
1329, n. (*a*).

(*n*) See above, pp. 65, 66, 727.

(*o*) See above, pp. 631—633.

(*p*) See above, pp. 79, 80, 353—
356, 611, 612.

property, or any part thereof, or on such land by such local authority, or any other body or person, the purchaser of such lot or property shall take the same subject to and shall discharge such liability, and shall indemnify the vendor against the same, whether any moneys to be paid pursuant to such liability shall be or become actually due or payable, or be or become a charge on the lot or property sold before or after the day hereby fixed for completion of the purchase (*q*).

12. Any insurance against fire subsisting on or as to any lot sold, or any part thereof or any building thereon, shall from the time of sale be for the benefit of the purchaser of that lot subject to the consent of the insurance office being obtained thereto, and subject to the purchase being completed, and to the purchaser paying a proportionate part of the premium for the unexpired term of the insurance; but the vendor shall not be bound to keep up or renew the insurance (*r*). Fire insurance.

13. No objection shall be taken on the ground of any document executed before or on the 16th of May, 1888, being unstamped or insufficiently stamped, or on account of any document which should or might have been registered in any county or other register not being so registered; and any document so executed which any purchaser may require to be stamped or further stamped, and any document which any purchaser may require to be registered, shall be so stamped or registered (if registration be possible) by and at the expense of such purchaser (*s*). Unstamped or unregistered documents.

14. No legal apportionment shall be required by any purchaser of any tithe rent-charge, rent or other outgoing whatever charged upon or payable in respect of any lot together with any other property, or of any rent reserved out of or affecting any lot together with any other property; but any apportionment of any such rent-charge, outgoing or rent as aforesaid which any purchaser may No legal apportionments to be required.

(*q*) See above, pp. 81, 82, 177, 178, 521, 522, 607, 608.

(*r*) See above, pp. 508; 509.

(*s*) See above, pp. 78, 79, 130, 131, 373—377.

require to be made, shall be made by the vendor or his agent, whose determination thereon shall be conclusive as against the purchaser (*t*).

Receipts for estate duty to be accepted.

15. The receipts for payment of any estate duty, which shall have become payable in respect of the property purchased, shall be accepted as conclusive evidence of the discharge of such duty, and a certificate of discharge of such duty shall not be required (*u*). No inquiry shall be made or objection taken on account of and no proof shall be required of the discharge of any estate duty which may have become payable in respect of any mortgage forming part of the title to the property purchased on the death of one of several joint mortgagees (*x*), or any succession or estate duty which may have become payable in respect of or charged upon any property now offered for sale or any part thereof by reason of any death which occurred more than twelve years before the date of the present sale (*y*).

No proof to be required as to estate duty on death of joint mortgagee, or succession, or estate duty on death more than twelve years ago.

Completion of the purchases.

16. Every purchase shall be completed on the —— day of ——, 19——, and on that day each purchaser shall pay the remainder of his purchase money, together with the value of any things agreed to be taken by him at a valuation pursuant to Special Condition No. 13, at the office aforesaid of the vendor's solicitors to the vendor or other persons or person entitled to receive the same, or as he or they shall in writing or otherwise duly authorise (*z*). Upon such payment the vendor and all other necessary parties (if any) will execute a proper assurance to each purchaser of the property purchased by him; but such assurance, and every other assurance and act (if any) which shall be required by any purchaser for getting in, surrendering, or releasing any outstanding estate, right, title or interest, or for completing or perfecting the vendor's title, or for any other purpose, shall be prepared, made and done by and at the expense of the purchaser requiring

(*t*) See above, pp. 81, 362, 363, 406, 716, 717.

(*u*) See above, pp. 1322, 1323.

(*x*) See above, pp. 241—244.

(*y*) See above, pp. 1283, 1289, 1313.

(*z*) See above, pp. 300, 301, 306, 736, 737, 740 *sq.*

the same (a); and the draft of every such assurance shall be left at the office aforesaid for perusal and approval on behalf of the vendor not less than twenty-one days before the said ——— day of ———, and the engrossment thereof shall be left at the same office for execution by the vendor not later than seven days before the said ——— day of ———.

17. The vendor shall have the option of determining whether the contract or the conveyance shall be stamped with the appropriate increment value duty stamp, and will duly present the particulars necessary for the assessment of such duty, and every purchase shall be completed pursuant to the preceding Condition either (as the vendor shall determine) on the production of the contract or conveyance so stamped or on delivery to the purchaser of the official receipt for such particulars; and in the first and last of these alternative cases the purchaser shall thereafter at his own expense procure the conveyance to be stamped with the appropriate stamp in respect of such duty (b).

As to the increment value duty stamp.

18. Every purchaser, who is by the particulars or the general or special conditions or by law required to grant or create by the deed of assurance to him of the lot or property purchased by him any easement or right reserved thereover for the use of the vendor or of the purchaser of any other lot or property (c), or to enter into any covenant of indemnity or otherwise with the vendor or any other purchaser to be contained in such deed (d), shall for this purpose execute and deliver to the vendor or such other purchaser (as the case shall require) a duplicate of the said deed of assurance, to be prepared and stamped by and at the expense of the purchaser so granting or covenanting (e).

Any purchaser required to grant or covenant to execute at his own expense duplicate of his assurance.

19. The vendor will retain possession of all documents of title which relate to any lot now offered for sale, and

Custody of title deeds.

(a) See above, pp. 67, 73 and n. (u), 620, 621.

(b) See above, pp. 708—712.

(c) See above, pp. 641, 642, 1220.

(d) See above, pp. 666—674.

(e) See above, p. 80 and n. (d).

also to any other property (whether real or personal) belonging to the vendor, either beneficially or as trustee, and retained by him (*f*). All documents of title (other than documents of record) which relate exclusively to any of the property now offered for sale will, if relating to one lot only, be delivered to the purchaser of that lot; but if relating to more than one lot, will be retained by the vendor until the whole of the property, to which they relate, shall have been disposed of (whether at the present or some future sale) and thereafter will be delivered to the purchaser who (whether at the present or at any past or future sale) shall have bought the largest part in value of the property, to which such documents relate, or in the event of equality of purchase money, to the purchaser of the first lot in order of sale of the lots in respect of which the purchase money is equal. And the vendor will, if required, give to the purchaser of any lot, to which any documents so retained relate, a statutory acknowledgment for production of such documents, and also (unless the vendor retains possession of the documents in a fiduciary capacity) a statutory undertaking for safe custody thereof (*g*).

Rents and
outgoings
until and after
completion.

20. The rents of each lot will be received or possession thereof retained, and the outgoings thereof (other than such outgoings as will have to be borne by the purchaser pursuant to General Condition No. 11) will be discharged by the vendor up to the said ——— day of ———. As from that day the outgoings of each lot (including, where the property is in hand, any rates made before but not demanded till after that date) shall be discharged, and the rents thereof received, or possession thereof taken, by the purchaser thereof. The rents and outgoings shall, if necessary, be apportioned between the vendor and the purchaser for the purpose of this condition; but the purchaser of each lot shall pay to the vendor at the time of completion, in addition to the purchase money, the apportioned part (if any) which shall be due to the vendor under

(*f*) See above, pp. 681, 682.

(*g*) See above, pp. 82, 683, 684.

this Condition of the current rents accrued due, but not become payable, in respect of the lot sold, less the proportion of current outgoings to be borne by the vendor, and shall thereupon become entitled to receive and recover the whole of such current rents from the tenant or tenants of the property (*h*). If from any cause whatever the purchase of any lot shall not be completed on the said ——— day of ———, the purchaser shall pay interest on the remainder of his purchase money, and on the value of any things agreed to be taken by him at a valuation, at the rate of 5*l.* per cent. per annum from that day until the purchase shall be completed, or the vendor may at his option take the rents and profits, less outgoings, up to the day of actual completion instead of such interest as aforesaid, and the purchaser shall not be entitled to any compensation for the vendor's delay or otherwise (*i*). Interest.

21. If any purchaser shall fail to comply with any of the general or special conditions his deposit shall thereupon be forfeited, and the vendor shall be at liberty to resell the lot or property bought by such purchaser at such time, in such manner and subject to such conditions as the vendor shall think fit, and any deficiency in price which may happen on and all expenses which may attend the resale, shall immediately afterwards be paid by the defaulter to the vendor, and in case of non-payment shall be recoverable by the vendor as liquidated damages (*k*). Power of
re-sale.

SPECIAL CONDITIONS OF SALE.

1. The title to Lots 1 to 120 shall commence with an indenture of re-settlement, dated the 12th of July, 1888, and made between the Right Honourable G. A. B., second Viscount N., of the first part, the vendor, then the Honourable E. J. B., of the second part, and J. S. and F. W., of the third part. By this indenture divers hereditaments of large value, situate in the counties of York, Leicester and Northampton, and therein specified or referred to by a general description, including in effect all the heredita-

(*h*) See above, pp. 67, 713—715. 721.

(*i*) See above, pp. 67, 68, 717— (*k*) See above, p. 68.

ments then or just before that day standing limited or settled to the uses of the will of the late G. D. B. (who died in the year 1851) were appointed by the said Viscount N. and the vendor, in exercise of a joint power of appointment vested in them by an indenture of disentailing assurance of even date, to uses under which the vendor is now seised of or entitled to the same hereditaments as tenant for life in possession without impeachment of waste. This appointment was made subject to (1) a charge of 30,000*l.* for portions created by the said Viscount N., by an indenture dated the 22nd of October, 1865, in exercise of a power contained in the will of the said G. D. B., and a term of 1,000 years created by the same indenture on trust to raise the said sum; and (2) a jointure rent-charge of 2,000*l.* a year charged by the said Viscount N. by an indenture dated the 1st of May, 1878, under a power contained in the same will in favour of the Right Honourable I. A., Viscountess N., now the widow of the said Viscount N., and a term of 300 years created by the same indenture for securing payment of the said rent-charge. The purchaser of any of the above-mentioned lots shall assume that the lot or property purchased by him was comprised in the property assured by the said indenture of re-settlement, and shall accept the said indenture of re-settlement as a good root of title in all respects (*l*), and shall take the lot or property purchased by him subject to the said charge of portions, term of 1,000 years, jointure rent-charge and term of 300 years, and shall not require the concurrence in the conveyance to him of the persons entitled thereunder respectively; but the vendor will, if required, covenant to keep such purchaser and the property purchased by him indemnified against the said charge of portions, jointure rent-charge and terms respectively (*m*).

2. The said indenture of re-settlement shall be accepted as conclusive evidence of everything recited, stated, noticed or implied therein, and also of the contents and due execution of every document recited or noticed therein, and that

(*l*) See above, pp. 100, 106—109, 202, 208—210.

(*m*) See above, pp. 613, 619, 643, 644, 664, 733.

any such document contains nothing material to the title beyond what is so recited or noticed ; and the purchaser of any of the above-mentioned lots shall not require the production of or make any requisition or objection with respect to any such document (*n*).

3. The vendor is selling Lots 1 to 120 under the power of sale given by the Settled Land Acts, 1882 to 1890, to him as tenant for life under the said indenture of re-settlement (*o*), and shall not be required to enter into any further or other covenants for the title thereto than those implied by statute on his conveying as beneficial owner subject to the proviso that, as respects the reversion or remainder expectant on his life estate therein and the title to and further assurance of such property after his death, such statutory covenants shall not extend to the acts, deeds or defaults of any person or persons other than or besides himself and his own heirs and persons claiming or to claim through or in trust for him, them or some of them (*p*).

4. All mines and minerals whatsoever in and under Lots 1 to 20 are excepted from this sale ; and there shall be reserved to the vendor and other owners of the freehold of the settled estates comprised in the said indenture of re-settlement all necessary or proper powers, rights and easements for sinking pits and shafts, laying down spoil-banks, depositing coal, minerals or rubbish, forming roads, tramways or railroads, erecting buildings, cottages for workmen, and machinery, and otherwise for searching for, winning, working, getting and carrying away the said excepted mines and minerals, whether by underground or surface workings (*q*), reasonable compensation being paid to the purchasers of any of those lots for all damage done by subsidence or otherwise to the surface or any buildings now standing or to be erected thereon, and for the occupa-

Exception of
mines and
minerals, and
reservation
of winning
powers.

(*n*) See above, pp. 136—141, 193, 194.

(*o*) See above, pp. 316 *sq*.

(*p*) See above, p. 656.

(*q*) If it be desired to reserve

power to let down the surface, insert here "including power to let down the surface, whether now or hereafter built upon or not."

tion of the surface in or about the exercise of such rights or powers (*r*).

5. A rent-charge of 70*l.* a year is payable to St. Boniface College, Oxbridge, out of lands in Naughton comprised in the said indenture of re-settlement, but it is difficult to define exactly what particular land is charged therewith. Lots 21 to 40 are sold subject to this rent-charge, but the purchaser of any of these lots shall not require the production of any document relating to the said rent-charge, or make any inquiry with respect to its creation or continuance, or investigate the title thereto in any manner. The payment of the said rent-charge will, for the purposes of the present sale, be apportioned between and charged exclusively upon the purchasers of Lots 28, 29, 30 and 31 in manner hereinafter mentioned. In respect of Lot 28, the apportioned part of the said rent-charge is 2*l.* 10*s.*, in respect of Lot 29, 9*l.*, in respect of Lot 30, 12*l.* 10*s.*, and in respect of Lot 31, 46*l.* The consent of the said college to this apportionment, or their concurrence therein shall not be required. Every purchaser of any of Lots 28 to 31 shall indemnify the rest of the property comprised in Lots 21 to 40 and the owners thereof against the payment of the said rent-charge of 70*l.* and all expenses incidental thereto by covenanting with trustees for the payment of his apportioned part of the said rent-charge, and by limiting to the same trustees in fee simple a rent-charge equal in amount to his apportioned part of the said rent-charge of 70*l.* to issue out of the lot purchased by him, with the powers of distress and other powers (except the power of limiting a term (*s*)) given by sect. 44 of the Conveyancing and Law of Property Act, 1881, for securing the payment of the said rent-charge so limited and all expenses incidental thereto, and further express powers of entry during the life of the last survivor of the purchasers of Lots 21 to 40 and any of their issue now living and twenty-one years after his death (*t*) for securing payment of such part of all expenses incidental to or

r See above, pp. 411—414.

(*s*) See above, pp. 673, 676, 677.

t See above, pp. 675—677.

occasioned by the non-payment of the said rent-charge of 70*l.* as shall be proportionate to the apportioned part of the said rent-charge of 70*l.* charged on the lot so purchased; subject to the proviso that, if and whenever such last-mentioned expenses shall be incurred or occasioned by the act, omission or default of the owner of that lot, as by his omitting to pay his apportioned part of the said rent-charge of 70*l.*, the whole of such expenses shall be recoverable under such express power of entry out of that lot exclusively. Such trustees shall be of such number as a majority in number of all the purchasers of Lots 21 to 40 shall determine, and shall be named as to one-half by the purchasers of Lots 28 to 31, and as to the other half by a majority in number of the other purchasers of Lots 21 to 40, and such provision for the appointment of new trustees, and other usual provisions shall be made as a majority in number of all the purchasers of Lots 21 to 40 shall determine. If any of Lots 21 to 40 shall not be sold, the vendor shall, for the purposes of this condition, stand in the place of the purchaser or purchasers of such lot or lots, except that, if any of Lots 28 to 31 shall not be sold, the vendor, being a tenant for life, shall not be required to indemnify the purchasers of Lots 21 to 40 or any of them, and the property comprised therein, otherwise than by covenanting for payment of the part of the said rent-charge of 70*l.* apportioned in respect of the unsold lot or lots during his life, and charging his life interest in the same lot or lots with the payment thereof. The said deed or deeds of indemnity shall be prepared by the vendor's solicitors, and the expense of preparing and executing the same shall be borne by the purchasers of Lots 21 to 40 in equal shares (*u*).

6. Lots 41 to 120 are building lots, and are sold subject to the following conditions (*x*):—

Building lots sold subject to restrictive and other conditions.

- (1.) The line of frontage of the buildings of these lots shall not approach nearer the road or roads abutting on such lots than the line marked "building line" on the Plans Nos. 2 and 3 annexed hereto

u See above, pp. 81—83.

(*x*) See above, pp. 83, 491 *sq.*

respectively, except as regards porticos and bay windows or similar structures, which shall not project more than four feet beyond such line; and no building of any kind (other than such boundary wall or fence as is hereby provided for) shall be erected on any part of any of these lots lying between such building line and the said road or roads.

- (2.) No house shall be erected on any of these lots on which the value of the houses to be erected is restricted by the particulars of sale, of less value than is specified in such particulars with regard to that lot.
- (3.) Any one of these lots which shall be sold shall be pegged out by the vendor's surveyor before the purchaser shall take possession thereof.
- (4.) Every purchaser of any of these lots shall, at his own expense within one year after the present sale, erect round the lot purchased by him or round or along so much thereof as the vendor's surveyor shall require to be fenced a boundary wall or fence of such materials, size and proportions as shall be required by such surveyor and to the satisfaction of such surveyor, and shall for ever after at his own expense maintain such wall or fence in good repair. Provided that the boundary wall or fence along any boundary marked "T" in the said Plans Nos. 2 or 3 shall be erected entirely at the expense of the purchaser of the lot whereon such boundary is so marked, and shall be the exclusive property of the purchaser so erecting the same, but the boundary wall or fence along any boundary marked "I" in the said Plans Nos. 2 or 3 shall be erected and maintained at the joint expense of the purchasers of the lots divided by such boundary, and shall be party-walls or fences to which such purchasers shall be entitled as tenants in common. And such surveyor as aforesaid may determine whether any existing boundary wall

or fence on any of these lots is sufficient or shall be replaced, added to or altered in order to comply with the above stipulation, and his determination on any of these questions shall be absolutely conclusive and binding on all purchasers at the present sale. Any existing boundary wall or fence marked "T" in the said Plans Nos. 2 or 3 shall be the exclusive property of the purchaser of the lot whereon it is erected, and any such wall or fence marked "I" in the same plans shall be a party-wall or fence, and shall belong to the purchasers of the lots divided thereby as tenants in common. If any lot on which the boundary is marked "I" on these plans shall not be sold at the present sale, the vendor will, as regards the property in any existing wall or fence erected on such boundary (but not otherwise), stand in the place of a purchaser of such lot; but the vendor shall not incur any obligation to contribute to the expense of replacing, adding to or altering such wall or fence, and where there is no existing wall or fence or such boundary, the vendor shall not be bound to contribute to the expense of erecting one, but may require the purchaser of the lot on the other side of such boundary to erect such boundary wall or fence as is hereby provided for entirely within such purchaser's own lot and at such purchaser's own expense entirely, such wall or fence when so erected to be such purchaser's exclusive property.

- (5.) No operative machinery or hut, shed, caravan, outdoor sleeping apartment, or other like structure or erection shall be fixed or placed on any of these lots except with the previous approval in writing of the vendor or his agent. And no portion of any of these lots shall be used (except as provided in the particulars of sale) as a road or way from or to any land adjoining or adjacent to the estate of the vendor.
- (6.) No house or other building shall be erected on any

of Lots 81 to 120, except in such situation and position as shall have been previously indicated to and approved of in writing by the vendor or his agent or otherwise than in conformity with plans, elevations and specifications which shall have been previously submitted to and approved of in writing by the vendor or his agent, nor shall any alteration therein or addition thereto be made without the like approval previously obtained.

(7.) These lots (41 to 120) shall not, nor shall any building erected on any of them be used as a hospital, or for any offensive, noisy, or dangerous pursuit or operation, or for any purpose which shall be a nuisance or annoyance to the vendor or the owners or occupiers of any other part or parts of the N. Settled Estates in the city of Winchester or any of them, or any purchaser at the present sale, and no building erected on any of Lots 95 to 120 shall be used otherwise than as a private dwelling-house, or as a coach-house or stabling, motor car or cycle house, or greenhouse connected therewith.

(8.) As between the purchasers at the present sale, the benefit as well as the burthen of these conditions (so far as they are restrictive of the use of or otherwise capable of running with land) shall be annexed to the lots hereinafter specified, so as to be enforceable by and against the purchasers thereof, their heirs and assigns to the following extent, but no further, namely, such of those conditions as relate to Lots 41 to 80, to those lots only; such of those conditions as relate to Lots 81 to 94, to those lots only; and such of those conditions as relate to Lots 95 to 120, to those lots only (*y*). But every purchaser of any of Lots 41 to 120 shall, in the conveyance of the property

^y The reason of this stipulation is that Lots 41 to 120 comprise three blocks of land (Lots 41

—80, 81—94, and 95—120), each situate some distance apart from the other.

purchased by him covenant with the vendor and his successors in estate to observe all such of these conditions as relate to such property to the intent that, so far as these conditions are restrictive or capable of running with land, the burthen thereof shall run with such property, and the benefit thereof run with the N. Settled Estates situate in or near the city of Nilchester, or any part thereof, including any lot or lots which shall not be sold at the present sale.

- (9.) Provided always that if any of Lots 41 to 120 shall not be sold at the present sale, the vendor shall not (except as hereinbefore provided) stand in the place of a purchaser thereof so as to be bound by the burthen of these conditions or any obligation therein imposed, but shall hold any such unsold lot free from all such conditions, burthen and obligation, and shall be at liberty to sell or dispose of the same at any time on such terms and conditions (if any) as he shall think fit.

- (10.) In this Special Condition No. 6 and the conditions herein contained the expression "the vendor" shall, except where repugnant to the context, include alternatively the other person or persons for the time being entitled in remainder expectant on the vendor's life estate under the above-mentioned indenture of re-settlement or the heirs or assigns of such of them as are so entitled in fee tail or fee simple.

7. The title to Lots 121 to 199 shall commence with the will dated the 12th of September, 1880, of the Right Honourable W. G. B., first Viscount N., who died on the 31st of December, 1880. By this will the said testator devised all his real estate not otherwise disposed of to his eldest son, the Honourable G. A. B. (afterwards the second Viscount N.), absolutely, but charged, in case the testator's personal estate not specifically bequeathed should be insufficient to pay his debts, funeral and testamentary

expenses and the pecuniary legacies and annuities given by his will or any codicil thereto, with the payment of such deficiency in aid of his residuary personal estate. The purchaser of any of these lots shall assume that the said testator was at the date of his death seised of all these lots for an unencumbered estate in fee simple (subject only to the leases or tenancies then affecting the same respectively), and that these lots formed part of the said testator's residuary real estate^(z); and shall not (save at his own expense) require any further or other abstract of the said will than of that part thereof which contains the above devise; and shall not make any requisition or inquiry with respect to or take any objection on account of the said charge in aid of the said testator's personalty, but shall assume that the said testator's funeral and testamentary expenses, debts, and legacies and annuities have all been duly paid, satisfied or provided for.

Leasehold lots held under one lease at an entire rent.

8. Lots 200 to 239 are held at one entire rent for the residue of a term of 99 years from the 29th of September, 1896, granted by an indenture dated the 3rd of December, 1896, and made between S. L. of the one part and T. B. of the other part. The title to these lots shall commence with this indenture^(a), and the sale thereof shall be carried out in the following manner^(b):—The rent shall be apportioned between these lots in the sums stated in the particulars and the purchaser of the largest part in value of these lots, or in the event of equality of purchase money the purchaser of such one of these lots as the vendor shall designate, shall take an assignment of the lease and shall execute underleases of the other lots to the purchasers thereof respectively for the whole term granted by the lease less one day, at the said apportioned rents respectively. Every such underlease shall contain proper covenants by the purchaser of the lot comprised therein for payment of the rent apportioned, and performance and observance of the covenants in the original lease in respect of such lot, and a proviso for re-entry by the grantor of

^(z) See above, p. 106.

^(a) See above, pp. 99—101.

^(b) See above, pp. 82, 269, 363.

the underlease on non-payment of the rent reserved thereby, or breach of any covenant contained therein, and also usual covenants by the grantor of the underlease for quiet enjoyment by the underlessee and for payment of the rent reserved by and performance and observance of the covenants contained in the original lease in respect of the rest of the property demised thereby, and a statutory acknowledgment and undertaking by the grantor of the underlease for production and safe custody of the original lease, and such other documents evidencing the subsequent title thereto as shall be handed over to the grantor of the underlease on the completion of the sale of the property purchased by him, but not any covenants for title by the vendor or other covenant of any kind. The purchaser of the largest part in value of the above-mentioned lots shall execute and deliver to the vendor a duplicate of the above-mentioned assignment, to be prepared and stamped by and at the expense of such purchaser, and every underlessee shall execute and deliver to the grantor of his underlease a counterpart of such underlease, to be prepared and stamped by and at the expense of such underlessee. If any lot shall remain unsold, the vendor shall, for the purposes of this condition, stand in the place of the purchaser of the largest part in value of the above-mentioned lots. The form of such assignment and of every such underlease shall be settled in case of dispute by the vendor's counsel, whose decision thereon shall be final and binding on all parties.

9. Lots 240 to 250 are held by lease for the residue of the respective terms mentioned in the particulars, and the title thereto shall commence with the indentures granting such leases respectively (*c*). Other lease-hold lots.

10. Lots 251 to 259 are held by underlease for the residue of the respective terms stated in the particulars, and the title thereto shall commence with the indentures granting such underleases respectively, and no objection shall be taken on the ground of any of these lots being held by underlease (*d*). Lots held by underlease.

(*c*) See above, pp. 99—101.

(*d*) See above, pp. 80, 99—101 and n. (*c*), 350.

As to the
leasehold lots.

11. Lots 200 to 259, being leasehold, are sold subject to the rent, covenants, conditions and all liabilities under the leases whereby the same are held respectively, and Lots 251 to 259, being held by underlease, are also sold subject to every superior lease and all liabilities thereunder (*e*); and no objection shall be taken on the ground that any lease, under which any property now offered for sale is held by the vendor, was granted in exercise of a power, and the instrument conferring the power shall not be required to be abstracted or produced (*f*). Every lease under which any property now offered for sale is held by the vendor, or a copy thereof, may be inspected at the office aforesaid of the vendor's solicitors at any time during office hours within the seven days (except the Sunday) next before the day of sale; and every purchaser, whether he shall avail himself of this opportunity of inspection or not, shall be deemed to have full notice of the contents of every such lease, whether of a usual character or not (*g*). The production of a receipt for the last payment of rent accrued due under any such lease prior to completion shall be accepted as conclusive evidence that all the covenants and conditions contained in the said lease, and also (in the case of any lot held by underlease) in every superior lease have been duly performed and observed, or that any breach thereof has been effectually waived down to the time of actual completion of the purchase; and it shall be assumed without proof that the person or persons giving such receipt, though not the original lessor, are the reversioner or reversioners expectant on the said lease or his or their duly authorised agent or agents (*h*).

Completion
as to lots in
the county of
London.

12. The purchase of any of Lots 121 to 259 shall be completed and the purchase money therefor paid by the purchaser thereof at the time and place and in the manner specified in General Condition No. 16; and upon execution by the vendor, or other necessary conveying parties, of such assurance by deed of the lot or property purchased as

(*e*) See above, pp. 79, 80.

(*f*) See above, p. 108 and n. (*a*).

(*g*) See above, pp. 79, 351.

(*h*) See above, pp. 79—81, 351—358.

the purchaser shall be entitled under General Condition No. 16 or Special Condition No. 8 to require, notwithstanding that the purchaser must be registered under the Land Transfer Acts, 1875 and 1897, as the proprietor of such lot or property before the legal estate therein can pass to him; and every purchaser of any of Lots 240 to 259 shall, after such completion of his purchase, at his own expense in all respects, forthwith take all proceedings necessary to procure such registration and complete such registration as soon as possible, and in any case not later than six calendar (i) months after such completion (k).

13. The tenant's fixtures on any of Lots 240—259, and the timber and other trees, tellers, pollards, saplings and underwood, down to the value of 1s. per stick, on any of Lots 10 to 15, and 27 to 32, shall be paid for by the purchaser at a valuation to be made [*continue as in Form 3, on p. 71, above, or as in note (m) thereto*].

Fixtures and timber on certain lots to be paid for at a valuation.

[*Add memorandum to be indorsed on the conditions in the same form as that on pp. 74, 75, above, substituting, "was declared the purchaser of Lot ——— thereof."*]

(i) See below, p. 1353, n. (n).

(k) See above, pp. 380—386.

APPENDIX (B).

(Referred to above, p. 93.)

—◆—

FORM OF CONTRACT FOR PRIVATE SALE OF
FREEHOLD LAND, WITH STIPULATIONS NOT
SETTLED EXCLUSIVELY IN THE VENDOR'S
INTEREST *(a)*.

ARTICLES OF AGREEMENT made this ——— day of ———, 1911, BETWEEN A. B., of [*insert description*] (hereinafter referred to as “the vendor”), of the one part, and C. D., of [*insert description*] (hereinafter referred to as “the purchaser”), of the other part. IT IS HEREBY AGREED between the said parties hereto as follows (that is to say):—

Agreement
for sale.

1. The vendor shall sell and the purchaser shall buy at the price of ———*l.* the freehold in fee simple, subject to the tenancies specified in the schedule hereto but otherwise free from incumbrances, of all those lands tenements and hereditaments particularly described in the schedule hereto.

Deposit.

2. The purchaser shall immediately upon signing this agreement pay the sum of ———*l.* *(b)* as a deposit and in part payment of the purchase money into the hands of Messrs. ———, of [*insert address of office*] the vendor's solicitors, who shall receive and hold the same as stakeholders *(c)*.

Fixtures and
timber to be
taken at a
valuation.

3. The fixtures in the house known as ——— Hall, ———, and the landlord's fixtures in the farmhouses at ——— Farm and ——— Farm, and the timber and other

(a) See above, pp. 83—93.

purchase money.

(b) Usually 10 per cent. of the

(c) See above, pp. 27, 87.

trees, tellers, pollards, saplings and underwood upon the whole property sold down to the value of 1s. per stick shall be paid for by the purchaser at a valuation, &c. [*continue as in Condition 3, p. 71, above*] (*d*).

4. The title shall commence with an indenture dated, &c., and made between, &c. [*for example, a deed dated thirty-two years before the contract*], the vendor undertaking that the said indenture shall prove to be a good root of title (*e*). Commence-
ment of title.

5. The vendor shall pay all such expenses of the production for verification of the abstract and the examination by the purchaser's solicitors of any documents which the purchaser can require to be abstracted and which are in the possession of any mortgagee or other incumbrancer, as the vendor would be bound to pay if the said documents were in his own possession (*f*). Vendor to
produce at his
own expense
all documents
in possession
of mort-
gagees.

6. The vendor shall send an abstract of his title to the purchaser's solicitors within fourteen days from the present date, and the purchaser shall send his requisitions and objections (if any) in respect of the title and all matters appearing on the abstract or this agreement to the office at ———, aforesaid of the vendor's said solicitors within twenty-one days after the day of the delivery of the abstract, and in these respects time shall be of the essence of the contract (*g*). In default of or subject only to any such requisitions and objections so made, the purchaser shall be taken to have accepted the title. Time limited
for delivery of
abstract and
making re-
quisitions on
title, &c.

7. If the purchaser shall insist on any requisition or objection as to the title, evidence of title, conveyance, possession, receipt of rents or any other matter appearing on the abstract or this agreement or connected with the sale which the vendor shall be unable or on the ground of expense or other reasonable ground (*h*) unwilling to remove or comply with, the vendor shall be at liberty, notwithstanding any negotiation or litigation in respect of such Reservation
to vendor of
right to
rescind the
contract.

(*d*) See above, pp. 60, 89.

(*g*) See above, p. 90.

(*e*) See above, p. 89.

(*h*) See above, p. 90.

(*f*) See above, pp. 90, 91.

requisition or objection, to give to the purchaser or his solicitors notice in writing of his intention to rescind the contract for sale unless such requisition or objection be withdrawn; and if such notice be given and the requisition or objection be not withdrawn within ten days after the day on which the notice was sent, the contract shall without further notice be rescinded. The vendor shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatever.

Identity.

8. The purchaser shall admit the identity of the property purchased with that comprised in the muniments offered by the vendor as the title to such property upon the evidence afforded by a comparison of the descriptions contained in the schedule hereto and in the muniments, together with a statutory declaration, to be made at the vendor's expense by some person acquainted with the property and the facts, that the property purchased has been enjoyed in accordance with the abstracted title for the twenty years next before the present date (*i*).

Compensation for errors of description.

9. The property is believed and shall be taken to be correctly described as to quantity and otherwise. The property is sold subject to all chief and other rents, rights of way and water, and other easements (if any) charged or subsisting thereon, and to all leases, tenancies and occupations, whether mentioned in the schedule hereto or not; and to all rights and claims of lessees, tenants and occupiers (*k*). If any error, misstatement, or omission be discovered in the schedule hereto, the same shall not annul the sale, but reasonable compensation shall be allowed by the vendor or the purchaser, as the case may require, in respect thereof (*l*), and the amount of such compensation shall in case of dispute be settled by two arbitrators or their umpire pursuant to the Arbitration Act, 1889.

Completion.

10. The purchaser shall pay the remainder of his purchase money, and the value of the fixtures, timber and

(*i*) See above, p. 91.

(*l*) See above, pp. 91, 727 *sq.*

(*k*) See above, p. 73, n. (*l*).

other trees, tellers, pollards, saplings, and underwood, on the —— day of —— next, at the office aforesaid of the vendor's said solicitors, to the vendor or as he shall in writing or otherwise duly authorise. Upon such payment the vendor and all other necessary parties (if any) will execute a proper assurance of the property to the purchaser. Such assurance shall be prepared by and at the expense of the purchaser (*m*); and the draft thereof shall be delivered at the office aforesaid for perusal and approval on behalf of the vendor not less than one calendar month (*n*) before the —— day of —— next, and the engrossment thereof shall be delivered at the same office for execution by the vendor not less than seven days before the —— day of —— next.

11. The vendor shall, as soon as possible and at his own expense, procure this contract and a duplicate thereof signed by him to be stamped with the appropriate increment value duty stamp (*o*), and deliver such duplicate when so stamped to the purchaser (*p*). Increment value duty stamp.

12. The rents will be received or possession retained, and the outgoings discharged by the vendor up to the said —— day of —— next. As from that day the outgoings shall be discharged, the rents received, and possession taken by the purchaser. The rents and outgoings shall, if necessary, be apportioned between the vendor and the purchaser for the purpose of this condition (*q*). Rents, outgoings, &c.

13. If the purchase shall not be completed on the said —— day of —— next, the purchaser shall pay interest Interest.

(*m*) See above, pp. 91, 92.

(*n*) In contracts for the sale of land the word *month* means *prima facie* a lunar month, but will mean a calendar month if it can be shown, either from the context or from surrounding circumstances, that such was the intention of the parties: *Lang v. Gale*, 1 M. & S. 111; *Simpson v. Margitson*, 11 Q. B. 23; *Bruner v. Moore*, (1904) 1 Ch. 305; *Sug. V. & P.* 257; 1 *Dart, V. & P.* 427 (5th ed.), 492 (6th ed.), 506 (7th ed.).

(*o*) See above, pp. 709, 710.

(*p*) The contract should be executed in triplicate, the purchaser signing one copy to be kept by the vendor and the vendor signing two copies and delivering one to the purchaser at once and retaining the other till stamped, as above provided. The purchaser will then be enabled to procure the conveyance to be stamped under stat. 10 Edw. 7, c. 8, s. 4 (7); see above, p. 708.

(*q*) See above, p. 92.

on the remainder of his purchase money and on the aforesaid value of the fixtures, timber and other trees, tellers, pollards, saplings, and underwood, at the rate of 4l. per cent. per annum from that day until the purchase shall be completed; provided that if the delay in completion shall arise from any other cause than the purchaser's own neglect or default, he shall be at liberty at his own risk to place the balance of the purchase money and the amount (so soon as ascertained) of any valuation to be made under this agreement in some bank to a deposit account and to give to the vendor or his solicitors notice in writing of such deposit, and after such deposit and notice he shall not be chargeable with interest on any purchase money so deposited at a higher rate than shall be allowed thereon by the bank (r).

SCHEDULE.

[*Containing a detailed description of the property sold and specifying the various tenancies under which the same is occupied.*]

(r) See above, p. 92.

APPENDIX (C).

(Referred to above, page 175.)



FORM OF INQUIRIES SUPPLEMENTAL TO REQUISITIONS ON TITLE (a).

1. Is the property sold let or in hand? If let, the lease or agreement for tenancy must, if in writing, be abstracted; if not in writing, the terms thereof must be stated.

2. Is the property sold, or any part thereof, subject to any tenants' claims for compensation or otherwise?

3. Is the property sold subject to any easement or other right, or to any rent-charge, or to any quit rent, heriot or other incident of tenure? If so, state the particulars.

4. What outgoings are there in respect of the property sold? State the particulars.

5. Is the property sold subject to any land improvement or other statutory charge of any kind? Has the vendor notice or knowledge of any fact (such as notice or a resolution by a local authority of intention to pave, sewer or light the adjoining streets, or a notice served by any person under any statute, or an order of any Court or Justice) which will, or may, subject the property sold, or the owner or occupier thereof, to some charge or liability at some future time?

(a) See above, pp. 175—178, 607—609.

6. Which of the abstracted documents will be delivered to the purchaser on completion? As regards any documents of title which the purchaser is not entitled to require to be so delivered to him, the vendor must procure proper statutory acknowledgments and undertakings to be given to the purchaser by the person or persons who actually retains or retain possession of such documents (*b*).

7. The vendor must, before the date fixed for completion of the purchase, do all that is requisite on his part for enabling the conveyance to be stamped with the appropriate increment value duty stamp (*c*).

(*b*) See above, pp. 684, 690.

(*c*) See above, pp. 47 (*Addenda*), 709—712.

APPENDIX (D).

(*Referred to above, page 1196.*)

SEARCH IN BANKRUPTCY ON THE SALE OF REGISTERED LAND.

The author's principal reason for advising that a search in bankruptcy should be made before completing a sale of registered land, is the enactment in the Land Transfer Act, 1897 (*a*), that, where a registered disposition would if unregistered be absolutely void, the register shall be rectified, and the person suffering loss by the rectification shall be entitled to an indemnity. When the registered proprietor of registered land is adjudged bankrupt, all his property, and the capacity to exercise all such powers over or in respect of property as might have been exercised by him for his own benefit at the commencement of his bankruptcy or before his discharge, vest in the trustee in the bankruptcy as from the date of the commission of the act of bankruptcy (if only one), on which the receiving order was made, or of the first of several acts of bankruptcy proved to have been committed by him within three months before the presentation of the bankruptcy petition on which such an order was made (*b*). The trustee is entitled to be registered as proprietor of the land in place of the bankrupt after it has been certified by the Court having jurisdiction in bankruptcy that the land is

Effect of the
bankruptcy
of the
registered
proprietor of
registered
land.

(*a*) Stat. 60 & 61 Vict. c. 65,
s. 7 (2); above, p. 1223.

(*b*) Stat. 46 & 47 Vict. c. 52,
ss. 20, 43, 44; 53 & 54 Vict.
c. 71, s. 20; above, p. 394, n. (*a*).

part of the bankrupt's property divisible amongst his creditors; and the official receiver is entitled to be registered pending the appointment of a trustee (*c*). Where the bankrupt is entitled to any land registered in his name for his own use, the legal estate therein appears to pass, with his other property, to the trustee: but until the trustee is registered as the proprietor, the bankrupt remains the registered proprietor of the land, and appears, as such, to retain the statutory powers (*d*) of disposition of the land by way of registered transfer for value and registered charge (*e*). It seems therefore that, but for the above mentioned enactment of the Land Transfer Act, 1897 (*f*), a purchaser of registered land would be enabled to rely on the extinguishing effect of a registered transfer for value (*g*) to destroy any estate or interest, which would be outstanding in the trustee, if the transferor were a bankrupt; and that the purchaser would not be obliged to search in bankruptcy. This enactment, however, raises a difficulty. No doubt if the sale were completed before the date of any receiving order made against the vendor and without notice to the purchaser of any available act of bankruptcy on the vendor's part, the transaction would be perfectly valid and unimpeachable by virtue of sect. 49 of the Bankruptcy Act, 1883 (*h*). This section, however, only protects payments and conveyances made before the date of the receiving order. If a receiving order should have been made against the registered proprietor of registered land, and he should afterwards execute a registered transfer for value, and should then be adjudged bankrupt, it appears that the registered disposition is one which if unregistered would be absolutely void (*i*). If so, it seems that the trustee in the bankruptcy would be entitled to claim rectification of the register under the above mentioned enactment (*f*), and the purchaser would have to give up the land and rest satisfied with his claim to an

(*c*) Stat. 38 & 39 Vict. c. 87, s. 43, amended by 60 & 61 Vict. c. 65, First Schedule; see Land Transfer Rules (1903), 193—200.

(*d*) Above, p. 1182.

(*e*) Above, p. 1165, n. (*c*).

(*f*) Above, p. 1357, n. (*a*).

(*g*) Above, pp. 1181, 1182.

(*h*) Stat. 46 & 47 Vict. c. 52; above, p. 544.

(*i*) Above, p. 550, and n. (*a*).

indemnity under the Land Transfer Act, 1897 (*l*). The same difficulty might arise if the registered proprietor of the land sold were an undischarged bankrupt at the date of the contract for sale, unless the property sold were a term of years, which had been acquired by or had devolved upon him since the commencement of the bankruptcy (*m*). Until these difficulties are dissolved by decision, it is thought to be advisable to search in bankruptcy before completing any sale of registered land; as the last thing that a purchaser would desire is to be immediately ejected and relegated to a claim for the statutory indemnity. It follows that, where a purchaser of registered land receives notice, before completion, of an act of bankruptcy committed by the vendor, he cannot safely proceed with the sale, except under the same conditions as would enable him to complete the contract if the land were not registered (*n*). It is thought that search in bankruptcy should certainly be made before advancing any money on the security of a registered charge on registered land; as no extinguishing effect is expressly given to such charges (*o*).

Where the vendor of registered land is an undischarged bankrupt.

Notice of an act of bankruptcy by the vendor, pending completion of a sale of registered land.

Search in contemplation of a mortgage.

It is thought to be unnecessary to make any search for deeds of arrangement (*p*) on the sale or mortgage by transfer of registered land. If the trustee and creditors thereunder choose to be satisfied with an unregistered assurance (not protected by restriction or caution) of the debtor's estate in his registered land, and allow him to remain registered as the proprietor of the land, it is thought that any estate or interest outstanding in the trustee or the creditors would certainly be extinguished by the effect of any subsequent registered transfer for value executed by the debtor (*q*), and would be postponed to any registered charge which he might afterwards make (*r*).

Deeds of arrangement.

(*l*) Stat. 60 & 61 Vict. c. 65, s. 7. It should be noted that by sub-sect. 3 a person shall not be entitled to indemnity for any loss where he has caused or substantially contributed to the loss by his act, neglect, or default. This

furnishes an additional reason for making the search.

(*m*) See above, p. 551.

(*n*) Above, pp. 547—550.

(*o*) See above, pp. 1238 *sq.*

(*p*) Above, pp. 595, 598.

(*q*) Above, pp. 1181, 1182.

(*r*) Above, p. 1189, n. (*x*).

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 Foy, Sharpe *v.*
 Frampton, Worley *v.*
 Francis, Godwin *v.*
 ——— Parkinson *v.*
 ——— Swire *v.*
 Franck, Hall *v.*
 Frankel, Garrard *v.*
 Franklyn, Lovelock *v.*
 Frankum, Gaston *v.*
 Fraser, Henthorn *v.*
 ——— Lumsden *v.*
 Frayling, *Re* Cunningham and.
 Frazer, Oppenheimer *v.*
 Freccia, Sturla *v.*
 Free, Blades *v.*
 Free Fishers of Whitstable, Gann *v.*
 Freeman, Doe *d.* Burrows *v.*
 ——— Fowle *v.*
 ——— Leppington *v.*
 ——— Malins *v.*
 Fremlin, *Re* Brooke and.
 Fricker, Donovan *v.*
 Frith, Parker *v.*
 Frost, *Re* Adams' Trustees and.
 ——— Dryden *v.*
 Fry, Queen's Proctor *v.*
 ——— Wilkins *v.*
 Fryer, Ewart *v.*
 ——— Hensman *v.*
 Fulham Corporation, Mason *v.*
 Fullarton, Mittelholzer *v.*
 Fuller, Cooke *v.*
 ——— Pounsett *v.*
 Furness, Vale of Neath Colliery Co. *v.*
 ——— Rail. Co., Wilson *v.*
 Furze, Lock *v.*
 ——— *Re* Venn and.
 Fyson, Malden *v.*
 Gabriel, Williams *v.*
 Gaby, Stump *v.*
 Gadd, Kirkwood *v.*
 Gadban, Musurus' Bey *v.*
 Gaisford, Ackland *v.*
 ——— *v.* Stone, Doe *d.*
 Gale, Cowles *v.*
 ——— Lang *v.*
 ——— Martin *v.*
 Gallagher, Johnson *v.*
 Games, National Provincial Bank of England *v.*
 Gandasequi, Paterson *v.*
 Garden, White *v.*
 Gardiner, Jones *v.*
 ——— Thackwell *v.*
 Gardner, Att.-Gen. *v.*
 ——— Pearce *v.*
 Gare, Pollard *v.*
 Garfit, Selwyn *v.*
 Garland, Smith *v.*
 Garret, Early *v.*
 Garrett, Moule *v.*
 Garrod, Brooke *v.*
 Gas Light and Coke Co., Cannon Brewery Co. *v.*
 Gaugain, Whitworth *v.*
 Gaukroger, Berry *v.*
 Gaunt, Speight *v.*
 Gayfere, Dixon *v.*
 Geach, Clemow *v.*
 Gell, Arkwright *v.*
 General Steam Navigation Co., Civil Service Co-operative Society *v.*
 Gerson, Kaufman *v.*
 Gerussi, Rivaz *v.*
 Gery, Milnes *v.*
 Gibbon, Phillipson *v.*
 ——— *Re* Kidd and.
 Gibbons, Jones *v.*
 Gibbs, Jesus College, Oxford *v.*
 Gibraltar (Att.-Gen. for), Pisani *v.*
 Gibson, Barr *v.*
 ——— Farebrother *v.*
 ——— Griggs *v.*
 ——— Lawes *v.*
 ——— Townley *v.*
 ——— Whatman *v.*

Gibson, Wilde *v.*
 ——— Wilkinson *v.*
 Giddings, Hitchcock *v.*
 Gidley, Bolitho *v.*
 Gilbert, Camfield *v.*
 ——— *v.* Ross, Doe *d.*
 Gilchrist, Ramsay *v.*
 Gill, Hext *v.*
 ——— Manning *v.*
 ——— Reeves *v.*
 ——— Wrigley *v.*
 Gillard, Hancock *v.*
 Gillespie, Mestear *v.*
 Gillett, King *v.*
 Gilmour, Miner *v.*
 Gilzean, *Re* Moncton and.
 Girdwood, Clark *v.*
 Girdlers' Co., Colebeck *v.*
 Glasgow Provident Investment
 Society, Westminster Fire
 Office *v.*
 Gledhill, Halifax Joint Stock Bank-
 ing Co. *v.*
 Glenton, Barnes *v.*
 ——— Ulster Permanent Build-
 ing Society *v.*
 ——— Williams *v.*
 Gloaher, Pease *v.*
 Glossop, Att.-Gen. *v.*
 Gloucester Corporation, Hope *v.*
 Glubb, Barret *v.*
 Glyn, Att.-Gen. *v.*
 Glynes, Munt *v.*
 Glynn, Duke of Beaufort *v.*
 Godfrey, Calvert *v.*
 Goldfinch, *Re* Maskell and.
 Goldingham, Dance *v.*
 ——— Robins *v.*
 Goldwin, Tenant *v.*
 Gomm, London & South Western
 Rail. Co. *v.*
 Gomme, Hill *v.*
 Goodale, Middlemore *v.*
 Goodfellow, Banks *v.*
 Goodman, Dewar *v.*
 Goodson, Bringloe *v.*
 Goodyear, Murrell *v.*
 Gord, Doe *d.* Needs *v.*
 Gordon, Capital and Counties
 Bank *v.*
 ——— Gwythor *v.*
 ——— R. *v.*
 ——— Rice *v.*
 ——— Roberts *v.*
 Goren, Palmer *v.*
 Gosdon, Ramsbottom *v.*
 Gosling, Att.-Gen. *v.*
 ——— Taite *v.*
 Gould, Le Lievre *v.*

Gould, *Re*, Espte. Official Receiver.
 Goulton, Ellis *v.*
 Gower, L. v. l. Att.-Gen. *v.*
 ——— Cleaton *v.*
 ——— Yellowly *v.*
 Grabham, Harvey *v.*
 Graham, *Espte.*, *Re* Blackburn and
 District Benefit Build-
 ing Society.
 ——— Carlisle Corporation *v.*
 ——— Ewart *v.*
 ——— Rickard *v.*
 Gramophone Co., Addis *v.*
 Grand Junction Canal, Dickinson *v.*
 Grant, Clarke *v.*
 ——— Halsey *v.*
 ——— Hamilton *v.*
 ——— Household Fire Insurance
 Co. *v.*
 ——— Irish Land Commission *v.*
 ——— Routledge *v.*
 ——— Twycross *v.*
 ——— Wilkinson *v.*
 Granville (Earl), Eardley *v.*
 ——— and Marsh, *Re*.
 Gravesend Corporation, *Re* Bos-
 worth and.
 Gray, Craggs *v.*
 ——— Delves *v.*
 ——— Falcke *v.*
 ——— Ridgway *v.*
 ——— *v.* Stanion, Doe *d.*
 ——— Watson *v.*
 ——— and New Land Development
 Association, *Re*.
 Grazebrook, Downes *v.*
 ——— *Re* Fisher and.
 ——— Hopkins *v.*
 Great Eastern Rail. Co., Att.-
 Gen. *v.*
 Great Eastern Rail. Co., Kensit *v.*
 Great Eastern Rail. Co., Pope *v.*
 Great Fingall Consolidated, Ltd.,
 Ruben *v.*
 Great Northern and City Rail. Co.,
 Dawson *v.*
 Great Northern Rail. Co., Lytton
v.
 Great Northern Rail. Co., Salis-
 bury *v.*
 Great Western Colliery Co., Agius
v.
 Great Western Rail. Co., Ayles-
 ford (Countess of) *v.*
 Great Western Rail. Co., Bay-
 ley *v.*
 Great Western Rail. Co., Simons *v.*
 Great Western Rail. Co., Storer *v.*
 Green, Bridgman *v.*

- Green, Claydon *v.*
 ——— *Re* Edwards *to.*
 ——— Fleetwood *v.*
 ——— Kennedy *v.*
 ——— Load *v.*
 ——— Rickett *v.*
 ——— Spoor *v.*
 ——— Turner *v.*
 Greenbank, Hearle *v.*
 Greene, Bartlett *v.*
 ——— R. *v.*
 Greenhough, Barraclough *v.*
 Greenshields, Barnhart *v.*
 Greenslade, Paramore *v.*
 Greenwood, Berdan *v.*
 ——— Firth *v.*
 ——— Greaves *v.*
 ——— Middleton *v.*
 Gregory *v.* Whichelo, Doe *d.*
 Grew, Icely *v.*
 Griffin, Avery *v.*
 ——— Doe *d.* Banning *v.*
 Griffith, Morgan *v.*
 ——— Pendred *v.*
 ——— Wood *v.*
 Griffiths, Summers *v.*
 Grimwade, Lound *v.*
 Grocock, Emery *v.*
 Grote, Rayner *v.*
 Grout, *Re* Wallis and.
 Grover, Hobbs *v.*
 Grubb, Barkshire *v.*
 Guest, Harrison *v.*
 ——— Lewin *v.*
 Guild, Gibbs *v.*
 Guildford, De Lassalle *v.*
 Guppy, Stevens *v.*
 Gurney, Palliser *v.*
 ——— Peek *v.*
 Gutch, Boyman *v.*
 Gutteridge, Phillips *v.*
 ——— Simpson *v.*
 Gwyfai District Council, Roberts *v.*
 Gwillim, Doe *d.* Gwillim *v.*
 Gye, Bettini *v.*
- Habgood, Bevan *v.*
 Haden, *Re* Glenton and Saunders *to.*
 ———, *Re* Jackson and.
 Hague, *Re* Trustees of Hollis'
 Hospital and.
 Haines, Cresswell *v.*
 ——— Thornett *v.*
 Hains, R. *v.*
 Haldimand, Macbeath *v.*
 Hale, Forster *v.*
- Hale, Hemming *v.*
 Halfpenny, Uvedale *v.*
 Hall, Cuff *v.*
 ——— Doe *d.* Bennington *v.*
 ——— Keech *v.*
 ——— Newton, Chambers & Co. *v.*
 ——— Doe *d.* Penfold *v.*
 Hallam, Stansfield *v.*
 Hallet, Hall *v.*
 Hallett, Att.-Gen. *v.*
 ——— Dimmock *v.*
 ——— *Re* Morton and.
 Halsey, Gunton *v.*
 Hamand, Best *v.*
 Hamilton, Dale *v.*
 ——— Darlington *v.*
 ——— Grosvenor Hotel Co. *v.*
 ——— Kendall *v.*
 Hammond, *Re* Hobart and.
 ——— Peto *v.*
 ——— Zalinoff *v.*
 Hanbury, Parkinson *v.*
 Hancock, Denny *v.*
 ——— Nickels *v.*
 ——— Spurrier *v.*
 ——— Williamson *v.*
 Hand-in-Hand Fire and Life In-
 surance Society, Life Interests
 and Reversionary Securities Cor-
 poration *v.*
 Handcock, Jolly *v.*
 Handley, Garrett *v.*
 Hankins, *Re* Brewer and.
 Hanning, Boyce *v.*
 Hanson, Drewe *v.*
 Harding, Clare Hall *v.*
 ——— De Bernardy *v.*
 Hardisty, Wainwright *v.*
 Hardman, Whitwood Chemical
 Co. *v.*
 Hardwick, Kidderminster Corpora-
 tion *v.*
 Hardy, Roberts *v.*
 ——— *Re* West and.
 Hare, Haverhill *v.*
 Hargrave, Dyer *v.*
 Harkness, D'Huart *v.*
 Harland, Patman *v.*
 Harlech, *Re* Allen and Cooper *to.*
 Harman, Robinson *v.*
 Harper, Lloyd's *v.*
 Harrington (Earl), Howitt *v.*
 Harris' Case, *Re* Imperial Land
 Co. of Marseilles.
 Harris, Bail *v.*
 ——— Barnwell *v.*
 ——— Chesterfield *v.*
 ——— *Re* Deighton and.
 ——— *Re* De Moleyn and.

- Harris, Tew *v.*
 Harrison, Goode *v.*
 ——— Humphreys *v.*
 ——— Pelton Bros. *v.*
 ——— Rodger *v.*
 ——— Rooper *v.*
 ——— Warlow *v.*
 ——— Wyatt *v.*
 Harrogate School Board, Kirby *v.*
 Harrop, Buckmaster *v.*
 Harston, *Re* Young and.
 Hart, Greenaway *v.*
 ——— *Re* Keek and.
 ——— Michael *v.*
 ——— Rolland *v.*
 ——— Wilson *v.*
 Hartley, Barrett *v.*
 Hartmont Phosphate Sewage Co. *v.*
 Hartopp, Flower *v.*
 Harvey, Turner *v.*
 Haslam, Blackburn *v.*
 Haslar, Tatam *v.*
 Haslett, *Re* Fisher and.
 Hastie, Couturier *v.*
 ——— *Re* Stone and.
 Hastings, Cave *v.*
 Hatchard, Griffiths *v.*
 Hatcher, Salisbury *v.*
 Hathaway, Price *v.*
 ——— Williams *v.*
 Hatton, Walker *v.*
 Haunchwood Brick and Tile Co.,
 Midland Rail Co. *v.*
 Hawker, Breeze *v.*
 ——— Wickham *v.*
 Hawkes, Eastern Counties Rail.
 Co. *v.*
 ——— Stronge *v.*
 Hawkins, Att.-Gen. *v.*
 ——— Matts *v.*
 ——— Polyblank *v.*
 Hawthorn, Doe *d.* Wellard *v.*
 Hawtrey, Molyneux *v.*
 Hay, Att.-Gen. *v.*
 Hayden, Keyse *v.*
 Hayes, Buttermere *v.*
 ——— Stanley *v.*
 Hayn, Holden *v.*
 Hayne, Doe *d.* Redfern *v.*
 Hayter, Phillipson *v.*
 Hayward, Greatrex *v.*
 Haywood, Hatton *v.*
 ——— Mills *v.*
 Hazeldine, Ray *v.*
 Healey, Pennington *v.*
 ——— Spence *v.*
 Heape, Sabin *v.*
 Heard, Thorne *v.*
 Hearn, Way *v.*
 Hearn, Woodham *v.*
 Heath, Schneider *v.*
 Heathcote, Duke of Sutherland *v.*
 Heather, Worthing Corporation *v.*
 Heaton, Gwynne *v.*
 Heaver, Lowther *v.*
 Hector, M'Connell *v.*
 Heelis, Emmerson *v.*
 Hellard, Doe *d.*
 ——— *Re* Horne and.
 Helmsley, Powell *v.*
 Helsham, Bos *v.*
 Hemsworth, Hopkins *v.*
 Henderson, Clarkson *v.*
 ——— Denning *v.*
 Hendon (Lord of the Manor of),
 R. *v.*
 ——— Walker *v.*
 ——— Urban District Council,
 Neeld *v.*
 Henley (Lord), Noel *v.*
 Henly, Ockenden *v.*
 Henning, Whittle *v.*
 Henry, Krell *v.*
 Hy. Lister and Son, Ltd., Hudders-
 field Banking Co. *v.*
 Henson, Cornwall *v.*
 Henty, Caballero *v.*
 Hereford, Helps *v.*
 Heriot, Hood-Barrs *v.*
 Herne Bay Commrs., Webb *v.*
 Herring, *Re* Bedingfield and.
 ——— Bennett *v.*
 Hertford (Marquis of), Gordon *v.*
 ——— Wyatt *v.*
 Heseltine, Simmons *v.*
 Hesketh, Mackenzie *v.*
 Hesse, Freer *v.*
 Hetherington, Watson *v.*
 Hewett, Kitton *v.*
 Hewitt, Brooke *v.*
 ——— Webb *v.*
 Hewlett, *Re* Hunter and.
 Heywood, Att.-Gen. *v.*
 Hiatts, Brown *v.*
 Hibbard, Smith *v.*
 Hickman, Thompson *v.*
 Hicks, Lovell *v.*
 ——— Oshey *v.*
 Hickson, Heilbutt *v.*
 Hide, Mosley *v.*
 Higgins, Brenchley *v.*
 ——— Dunlop *v.*
 Higginson, Bird *v.*
 ——— Clowes *v.*
 Higgs, Diggle *v.*
 ——— Luky *v.*
 Hiles, Jenkins *v.*
 Hill, Coldcot *v.*

- Hill, *Re Ford and*.
 ——— Heaphy *v.*
 ——— Mason *v.*
 ——— Poole *v.*
 ——— Trimble *v.*
 Hillacre, White *v.*
 Hillas, Leuty *v.*
 Hillman, *Expte.*, *Re Pumphrey*.
 ——— Hiatt *v.*
 ——— Lewis *v.*
 Hindle, Catterall *v.*
 Hine, Picard *v.*
 Hinton, Oliver *v.*
 Hiscocks, Doe *d.* Hiscocks *v.*
 Hitchman, *Re Higgins and*.
 Hoade, Nigel Gold Mining Co. *v.*
 Hoare, Evans *v.*
 Hobbs, International Tea Stores *v.*
 ——— Ward *v.*
 Hobhouse, Jackson *v.*
 Hobson, Battison *v.*
 Hoddinott, Biggs *v.*
 Hodges, Lord Anson *v.*
 ——— Hermann *v.*
 Hodgson, Holtby *v.*
 ——— Mallalieu *v.*
 Hodson, Reeve *v.*
 Hogg, Doe *d.* Cutlers' Co. *v.*
 Hoggart, Harington *v.*
 Holbech, Bree *v.*
 Holden, Att.-Gen. *v.*
 Holford, Att.-Gen. *v.*
 Holgate, Nelthorpe *v.*
 Holland, Bromley *v.*
 ——— Taylor *v.*
 Holloway, Camberwell and South
 London Building So-
 ciety *v.*
 ——— Skipper *v.*
 Holmes, *Re Fawcett and*.
 Holt, *Re Thompson and*.
 Holyland, Campbell *v.*
 Home, Lyon *v.*
 Homfray, Mitchell *v.*
 Hood, Cooper *v.*
 ——— Earl Poulett *v.*
 Hook, Brook *v.*
 ——— Hucklesby *v.*
 Hooker, Fildes *v.*
 Hop and Malt Exchange and
 Warehouse, *Re, Expte.* Briggs.
 Hoper, Copestake *v.*
 Hopkins, Chanter *v.*
 ——— Field *v.*
 Hopkinson, Bunny *v.*
 Hopkyns, Howard *v.*
 Hopwood, Cunard Steamship Co. *v.*
 Hordern, Pouey *v.*
 Horne, Doe *d.* Levy *v.*
 Horne, Page *v.*
 ——— Quinion *v.*
 Horne Payne, Hussey *v.*
 Horner, Cadman *v.*
 Horsfall, Hodges *v.*
 Horton, Richardson *v.*
 ——— Wright *v.*
 Horwood, Underhill *v.*
 Hose, Heppenstall *v.*
 Hosegood, Rogers *v.*
 Hotson, Alley *v.*
 Houghton, Gadd *v.*
 ——— Northumberland *v.*
 Houldsworth, Illingworth *v.*
 Hounsell, Filby *v.*
 House Property and Investment
 Society, Sear *v.*
 Hovenden, Marjoribanks *v.*
 Howard, Barnett *v.*
 ——— Flint *v.*
 ——— Henniker *v.*
 ——— Wright *v.*
 Howell, Buckley *v.*
 ——— Glyn *v.*
 Howells, Doe *d.* Preece *v.*
 Howes, *Re Hodson and*.
 Howkins, Rainbow *v.*
 Hubbuck, Att.-Gen. *v.*
 Hudson, Archer *v.*
 ——— Brazier *v.*
 Hugell, Grover *v.*
 Hugh, Whitehouse *v.*
 Hughes, Doe *d.* Jones *v.*
 ——— Isaac *v.*
 ——— Jayne *v.*
 ——— Smith *v.*
 ——— Webb *v.*
 ——— Whincup *v.*
 Hulme, Coles *v.*
 Humble, M'Iver *v.*
 Humphrey, Wentworth *v.*
 Humphreys, Firkbank's Executors *v.*
 ——— Green *v.*
 ——— Hutchings *v.*
 ——— Jones *v.*
 Hungerford, Att.-Gen. *v.*
 Hunt, Bateman *v.*
 ——— Lancashire *v.*
 ——— Morgan *v.*
 ——— Pedder *v.*
 ——— Pinney *v.*
 Hunter, Barnard *v.*
 ——— Humble *v.*
 ——— Jarrett *v.*
 Hunting, Oliver *v.*
 Hurd, Lindsay Petroleum Co. *v.*
 ——— Redgrave *v.*
 Hurst, Doe *d.* Clifton *v.*
 ——— Parnham *v.*

- Hutcheus, Bull *v.*
 Hutchins, Letts *v.*
 Hutchinson, Dobell *v.*
 ——— Featherston *v.*
 ——— Heyworth *v.*
 ——— Palmer *v.*
 Hutt, Broughton *v.*
 ——— Southby *v.*
 Hutton, Herne Bay Steamboat Co. *v.*
 Hyatt, Spyer *v.*
 Hyland, Bowman *v.*
- Ibbetson, Rhodes *v.*
 Iggulden, Lancefield *v.*
 Ilbery, Smout *v.*
 Illingworth, Barker *v.*
 ——— Leyland *v.*
 Imperial Gas Light and Coke Co., Church *v.*
 Imperial Gas Light and Coke Co., Clarke *v.*
 Imperial Ottoman Bank, Borries *v.*
 Ince, Elliot *v.*
 Inderwick, Moxhay *v.*
 Indian Mammoth Gold Mines Co., Hughes-Hallett *v.*
 Ingham, Rogers *v.*
 ——— Winterbottom *v.*
 Ingle, Lacey *v.*
 Ingoldsby, Bennett *v.*
 Ingram, Garden *v.*
 Inland Revenue (Commissioners of), Marquis of Bristol *v.*
 Inland Revenue (Commissioners of), Chesterfield Brewery Co. *v.*
 Inland Revenue (Commissioners of), J. & P. Coats *v.*
 Inland Revenue (Commissioners of), Earl Cowley *v.*
 Inland Revenue (Commissioners of), Danubian Sugar Factories, Ltd. *v.*
 Inland Revenue (Commissioners of), Farmer & Co. *v.*
 Inland Revenue (Commissioners of), Great Northern Rail. Co. *v.*
 Inland Revenue (Commissioners of), Great Western Rail. Co. *v.*
 Inland Revenue (Commissioners of), Huntington *v.*
 Inland Revenue (Commissioners of), Kemp *v.*
 Inland Revenue (Commissioners of), Lawson *v.*
- Inland Revenue (Commissioners of), Limmer Asphalte Paving Co. *v.*
 Inland Revenue (Commissioners of), Muller & Co.'s Margarine, Ltd. *v.*
 Inland Revenue (Commissioners of), Old Battersea Building Society *v.*
 Inland Revenue (Commissioners of), Potter *v.*
 Inland Revenue (Commissioners of), Smelting Co. of Australia *v.*
 Inland Revenue (Commissioners of), Swayne *v.*
 Inland Revenue (Commissioners of), Underground, &c. Co. *v.*
 Inland Revenue (Commissioners of), West London Syndicate *v.*
 Inman, Nash *v.*
 Inskip, Lord Braybrooke *v.*
 Ireland, Mortimer *v.*
 Isaacs, West of England Fire Insurance Co. *v.*
 Isle of Wight Rail. Co., Greenhill *v.*
 ——— Munns *v.*
 Iveagh (Lord), *Re* Marquis of Ailesbury and.
- Jack, Leigh *v.*
 Jackman, Scott *v.*
 Jackson, Att.-Gen. *v.*
 ——— Carr *v.*
 ——— Cooth *v.*
 ——— Evans *v.*
 ——— Harrison *v.*
 ——— Hastelow *v.*
 ——— Jones *v.*
 ——— Lane *v.*
 ——— National Provincial Bank of England *v.*
 ——— Pease *v.*
 ——— Rich *v.*
 ——— Selby *v.*
 Jacob, Warner *v.*
 Jacobs, Doe *d.* Phillips *v.*
 Jacobs-Smith, Att.-Gen. *v.*
 Jakins, Doe *d.*
 James, Ashby *v.*
 ——— Baumann *v.*
 ——— Lewis *v.*
 ——— Lucas *v.*
 ——— *Re* Sparrow and.
 ——— Symons *v.*
 ——— Tamplin *v.*
 Janson, Driefontein Mines, Ltd. *v.*

- Janssen, Earl of Chesterfield *v.*
 Jardine, Scarf *v.*
 Jarman, Harle *v.*
 ——— Townsend *v.*
 Jarrah Corporation, Samuel *v.*
 Jay, Leach *v.*
 Jefferys *v.* Bucknell, Right *d.*
 Jeffreys, Goddard *v.*
 ——— Morgan *v.*
 ——— Walker *v.*
 Jenkins, Ayerst *v.*
 ——— Bonnewell *v.*
 ——— Collier *v.*
 ——— Doe *d.* Davies *v.*
 ——— Hanbury *v.*
 ——— Price *v.*
 ——— Wolley *v.*
 Jennings, Mules *v.*
 ——— Waite *v.*
 Jepson, Parfitt *v.*
 Jerningham, Crutchley *v.*
 Jersey (Earl of), Llewellyn *v.*
 Jervas, Austen *v.*
 Jervis, Kinderley *v.*
 Jesson, *Re* Duthy and.
 Jeuchner, Herman *v.*
 Jewish Colonization Association,
 Att.-Gen. *v.*
 Jewsbury, Swift *v.*
 Jeyes, Gibson *v.*
 Joans, Meredith *v.*
 Johnes, Lloyd *v.*
 Johnson, Att.-Gen. *v.*
 ——— Bates *v.*
 ——— Graham *v.*
 ——— Holman *v.*
 ——— Kay *v.*
 ——— Lloyd *v.*
 ——— Palmer *v.*
 ——— Shaw *v.*
 ——— Westminster Corporation
v.
 Johnston, Bonner *v.*
 ——— Mayfair Property Co. *v.*
 ——— Salkeld *v.*
 ——— Taylor *v.*
 ——— Wilkinson *v.*
 Jolliffe, Mundy *v.*
 Jones, Ashton *v.*
 ——— Boulton *v.*
 ——— Briggs *v.*
 ——— Campbell *v.*
 ——— Doe *d.* Clay *v.*
 ——— Wigan *v.*
 ——— *v.* Humphreys, Doe *d.*
 ——— Jenkins *v.*
 ——— King *v.*
 ——— Lewis *v.*
 ——— Lloyds Banking Co. *v.*
 Jones, *Re* Metropolitan Bank and.
 ——— Morphet *v.*
 ——— Nicholl *v.*
 ——— Sainsbury *v.*
 ——— Simson *v.*
 ——— Stanley *v.*
 ——— Waite *v.*
 Jordan, Jennings *v.*
 ——— *Re* Ward and.
 Joseph, Clare *v.*
 Joy, Birch *v.*
 Judge, Tomson *v.*
 Just, Jones *v.*
 Kalloway, Short *v.*
 Kattenburg, Seroka *v.*
 Kay, Smith *v.*
 Kaye, Beaumont *v.*
 ——— Haigh *v.*
 Kearney, Jones *v.*
 Kearse, Wilson *v.*
 Kearsley, Morris *v.*
 Keat, Hicks *v.*
 Keating, Wilson *v.*
 Keatley, Shepherd *v.*
 Keeley, Winch *v.*
 Keeling, *Re* Salt, Brothwood *v.*
 Keeves, Blaiberg *v.*
 Kekulé, Loder *v.*
 Kelland, Wilson *v.*
 Kellerman, East London Water-
 works Co. *v.*
 Kelly, Clifford *v.*
 Kelsall, *Re* Dickin and.
 Kelson, Watts *v.*
 Kemp, Doe *d.*
 ——— Hawkins *v.*
 ——— Sober *v.*
 Kempster, Perham *v.*
 Kendall, Cooper *v.*
 ——— De Silvale *v.*
 Kenderdine, *Re* Carter and.
 Kennedy, Batten Poole *v.*
 ——— Lyell *v.*
 ——— Morris *v.*
 ——— Stewart *v.*
 Kennett, Johnson *v.*
 Kensington (Lord), Rooke *v.*
 ——— Vestry and Adams, *Re.*
 Kent, Bond *v.*
 ——— *Re* Davies and.
 ——— Marsden *v.*
 ——— County Council, Countess
 Belmore *v.*
 Kenworthy, Heald *v.*
 Ker, Weller *v.*
 Kernan, Molony *v.*

- Kerr, James *v.*
 Kesterton, Bates *v.*
 Kesteven County Council, Curtis *v.*
 Keverberg, Barden *v.*
 Key, Sharp *v.*
 Keys, Vernon *v.*
 Keyser, New York Security and Trust Co. *v.*
 Kidd, Roake *v.*
 Kidgill, Brewster *v.*
 Kilvert, Robinson *v.*
 Kine, Goodman *v.*
 King, Barnett *v.*
 ——— Beaden *v.*
 ——— Catling *v.*
 ——— Jones *v.*
 ——— Savery *v.*
 ——— Watson *v.*
 Kingham, Chambers *v.*
 Kingscote, Earle *v.*
 ——— Elmore *v.*
 Kingston-upon-Hull Corporation, Wells *v.*
 Kinnaird, Alvanley *v.*
 Kinnear, Hook *v.*
 Kirby, Webb *v.*
 Kirkman, Lethbridge *v.*
 Kirkpatrick, Hayden *v.*
 Kirwood, Minton *v.*
 Kisch, Central Rail. Co. of Venezuela *v.*
 Kitchell or Kitchin, Brewster *v.*
 Kitson, West London Commercial Bank *v.*
 Knapp, Nicholson *v.*
 Knight, Frost *v.*
 ——— Hipwell *v.*
 ——— *Re* Stamford, Spalding and Boston Banking Co. and
 ——— Winchester *v.*
 Knott, South Eastern Rail. Co. *v.*
 Knotts, Magdalen Hospital *v.*
 Koffler, Lever *v.*
 Koonj Behari Pattuk, Rameshwar Pershad Narain Singh *v.*
 Kyte, Beale *v.*

 Lacey, Lindley *v.*
 L'Aigle, De Gaillon *v.*
 Lake, Bird *v.*
 ——— Hanson *v.*
 ——— Williams *v.*
 Lamb, Clare *v.*
 ——— R. *v.*
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 Pitcher, Rogers *v.*
 Pitchers, Jumpsen *v.*
 Pitfield, Marlow *v.*
 Platt, May *v.*
 Pluckwell, Philliskirk *v.*
 Plumbé, Yates *v.*
 Plummer, Brandling *v.*
 Pochin, *Re* Finnis and Young to Forbes and.
 Pocknell, Buckland *v.*
 Pocock, Hume *v.*
 ——— Knight *v.*
 Poland, *Re* Judd and Sketcher and.
 Pollard, Booth *v.*
 ——— Cood *v.*
 Pomfret (Earl of), Lord Lempster *v.*
 Poncia, Taylor *v.*
 Pontypridd Urban District Council, Att.-Gen. *v.*
 Pook, Dowden *v.*
 Poole, Barclay & Co. *v.*
 Pooley, Athenæum Life Assurance Society (Official Manager of) *v.*
 Pope, Cavalier *v.*
 Port Erin Commissioners, Laugh-ton *v.*
 Port Philip Gold Mining Co., Shaw *v.*
 Portal, Grove *v.*
 Porter, Cubitt *v.*
 ——— Sprye *v.*
 Porthgain Harbour Co., Hart *v.*
 Portington, Taylor *v.*

- Pott, Williams *v.*
 Potter, Credland *v.*
 Potts, *Re* Nisbet and.
 Powell, Seabourne *v.*
 Powell, Capel *v.*
 ——— Chester *v.*
 ——— Cutter *v.*
 ——— *Re* Douglas and.
 ——— Keyes *v.*
 ——— Marshall *v.*
 ——— Thomas *v.*
 Powles, Jones *v.*
 Powlet, Parteriche *v.*
 Prankerd, *Re* Pocock and.
 Preece *v.* Howells, Doe *d.*
 Prescott, Hopkins *v.*
 Preston, Castellain *v.*
 ——— Rayner *v.*
 ——— Tone *v.*
 Price, Baugh *v.*
 ——— Berwick *v.*
 ——— Curtis *v.*
 ——— Doe *v.*
 ——— Green *v.*
 ——— Harrington *v.*
 ——— Jackson *v.*
 ——— Jenkins *v.*
 ——— Lord *v.*
 Prichitt *v.* Mitchell, Doe *d.*
 Pride, Spring *v.*
 Priamore, Craven *v.*
 Priestley, Commissioners of Inland Revenue *v.*
 Prince, Cavell *v.*
 ——— Nottidge *v.*
 Pring *v.* Pearsey, Doe *d.*
 Pritchard *v.* Dodd, Doe *d.*
 ——— Jones *v.*
 Probyn, Phillips *v.*
 Proctor, Kemeys *v.*
 ——— White *v.*
 Prosser, Smith *v.*
 Prothero, Phelps *v.*
 Provincial Union Bank, Gadd *v.*
 Prowse, Nairn *v.*
 Pugh, Hoddel *v.*
 Pulsford, Green *v.*
 Pulteney, Dyer *v.*
 Pumfrey, *Expte.*, Hillman, *Re.*
 Pump House Hotel Co., Hughes *v.*
 Pung, Ray *v.*
 Purcell, Fitzhardinge *v.*
 ——— Manning *v.*
 Purrier, Harford *v.*
 Pursell, Lavery *v.*
 Pycroft, Martin *v.*
 Queinton, *Re* Kite and.
 R., Crossman *v.*
 ——— Davenport *v.*
 ——— Ellis *v.*
 Rabbits, Pollock *v.*
 Raester, Barnes *v.*
 Radcliffe, Anderson *v.*
 Radford *v.* Southern, Goodtitle *d.*
 Randle, Brown *v.*
 Raine, Barclay *v.*
 Raisbeck, Moor *v.*
 Raishleigh, Ilchester *v.*
 Ramuz, Clarke *v.*
 Randall, *Re* Jenkins and.
 ——— Lett *v.*
 ——— Tappenden *v.*
 Rashleigh, Tremayne *v.*
 ——— Vezey *v.*
 Ratcliffe, London and County Banking Co. *v.*
 Ravenscroft, Lumley *v.*
 Ravey, Morgan *v.*
 Rawlins, Pilcher *v.*
 Rawyards Coal Co., Livingstone *v.*
 Rayer, Purvis *v.*
 Rayner, Brigstocke *v.*
 Reacher, Elliston *v.*
 Read, Baker *v.*
 Reade, Cripps *v.*
 Redfern, Doe *d.* Hayne *v.*
 Redgrave, Wright *v.*
 Rees, Lewis *v.*
 Reeves, Foster *v.*
 Refuge Assurance Co., Kettlewell *v.*
 Registrar for Middlesex, R. *v.*
 ——— of Titles, Spencer *v.*
 Reid, Watson *v.*
 Remnant, Hunt *v.*
 Rennick *v.* Armstrong, Jack *d.*
 Revell, Jacobs *v.*
 Reynolds, Mitchel *v.*
 Rhoades, Lord Selsey *v.*
 Rhodes, Capital and Counties Bank *v.*
 ——— Ibbottson *v.*
 ——— Morgan *v.*
 ——— Turquand *v.*
 Riccard, Nott *v.*
 Rice, Noakes & Co., Ltd. *v.*
 Richard, Molyneux *v.*
 Richards, Chasemore *v.*
 ——— Lyle *v.*
 ——— Pulsford *v.*
 Richardson, Bailey *v.*
 ——— Baudains *v.*

- Richardson, Bywater *v.*
 ——— Glasbrook *v.*
 ——— Glass *v.*
 ——— St. Thomas' Hospital
 Governors *v.*
 ——— Walker *v.*
 ——— Wood *v.*
 Richer, *Re* Bettesworth and.
 Riches, Bradley *v.*
 Richmond (Duke of), Att.-Gen. *v.*
 Ridley, Robinson *v.*
 Rigby, Horrocks *v.*
 Rimmer, Jones *v.*
 Rimmer, Freer *v.*
 Ringer, Thompson *v.*
 Ripplingale, Lloyd *v.*
 Rival Granite Quarries, Ltd.,
 Evans *v.*
 River Dee Co., Baroness Wenlock *v.*
 Roberts, Casson *v.*
 ——— Doe *d.* Roberts *v.*
 ——— Moor *v.*
 ——— Shoolbred *v.*
 Robertson, Durham Bros. *v.*
 Robins, Evans *v.*
 ——— Rummens *v.*
 Robinson *v.* Allsop, Doe *d.*
 ——— Devaynes *v.*
 ——— Farmer *v.*
 ——— Hallas *v.*
 ——— Jay *v.*
 ——— Lennard *v.*
 ——— Midland Rail Co. *v.*
 ——— Mollett *v.*
 ——— Philips *v.*
 ——— Smith *v.*
 ——— Stowell *v.*
 Robotham, Hughes *v.*
 Rochdale Canal Co., Chamber Col-
 liery Co. *v.*
 Roche, *Re* Biggs and.
 ——— Bourdillon *v.*
 Rochford Rural District Council,
 Offin *v.*
 Rodgers, Furtado *v.*
 Roe, Evans *v.*
 ——— *d.* Fox, Marston *v.*
 Roebuck, Calcraft *v.*
 Rogers, Bowles *v.*
 ——— Ellis *v.*
 ——— Lambert *v.*
 ——— Newman *v.*
 Rokeby (Lord), Binks *v.*
 Rolt, Hopkinson *v.*
 Romney (Earl of), Earl of Brad-
 ford *v.*
 Roper, May *v.*
 ——— *Re* Mundy and.
 Rose, Richards *v.*
 Rosier, Shackell *v.*
 Ross, Birmingham, Dudley and
 District Banking Co. *v.*
 ——— Doe *d.* Gilbert *v.*
 Rossborough, Boyse *v.*
 Rossiter, Britain *v.*
 Rothwell, Greenwood *v.*
 ——— Hargreaves *v.*
 Round, Bowles *v.*
 Rounthwaite, Lord Brooke *v.*
 Rouse, Kinsman *v.*
 Routledge, Warne *v.*
 Rowe, Calmady *v.*
 ——— Norway *v.*
 Rowlands, Cope *v.*
 ——— Morgan *v.*
 Rowlett, *Re* Osborne to.
 Royal, Morse *v.*
 Royal Exchange Assurance Cor-
 poration, Collingridge *v.*
 Royal Exchange Assurance Cor-
 poration, Gedge *v.*
 Royal Exchange Assurance Cor-
 poration, Henkle *v.*
 Royal Panopticon, Clarke *v.*
 Royle, Clarke *v.*
 Royse, Hamilton *v.*
 Rudry Merthyr Steam and House
 Coal Colliery Co., County of
 Gloucester Bank *v.*
 Rufford, Clay *v.*
 Rundall, Jennings *v.*
 Rush, Gilbey *v.*
 Rusham, Doe *d.* Newman *v.*
 Russel, Pigot *v.*
 Russell, Hartley *v.*
 ——— Hatten *v.*
 ——— Morgan *v.*
 ——— Taylor *v.*
 ——— Webb *v.*
 ——— Western *v.*
 Rutland (Duchess of), Wakeman *v.*
 ——— (Duke of), Harrison *v.*
 Ryde, Jones *v.*
 Rymney Iron Co., Brewer *v.*
 Sabin, David *v.*
 Sabieue, Bellamy *v.*
 Sadd, Simpson *v.*
 Saffron Hill (Inhabitants of), R. *v.*
 Sainsbury, Mason *v.*
 St. George's Vestry, Southwark,
 Rolls *v.*
 St. John, Stranks *v.*
 ——— Willé *v.*

St. Margaret's, St. George's
Parish *v.*
St. Paul's (Dean of), Bettesworth *v.*
——— Vigers *v.*
St. Peter's Churchwardens, John-
son *v.*
St. Sauveur, Sharp *v.*
Sales, Goodright *v.*
Salisbury, Goman *v.*
Salmon, Bartlett *v.*
Salt, Carlish *v.*
—— *Re* Marshall and.
Salter, James *v.*
Samels, Higgins *v.*
Sampson, Collard *v.*
Samuel, Clough *v.*
—— Pews *v.*
Sanders, Potter *v.*
Sanderson, *Re* Great Northern Rail.
Co. and.
Sandilands, Spooner *v.*
Sundys (Lord), Earl of Hard-
wicke *v.*
—— Warburton *v.*
Sankey, Lee *v.*
Sanxter, Eaton *v.*
Sarel, Wallis *v.*
Sargent, Bunting *v.*
Sartoris, Duke of Marlborough *v.*
Satchell, Rowell *v.*
Saunders, *Re* Glenton and Haden to.
—— *Re* Voss and.
Savage, Boursot *v.*
—— Weston *v.*
Sawbridge, Debenham *v.*
Sayer, Crosbie Hill *v.*
Scarisbrick, Talbot *v.*
Searth, Wood *v.*
Schiller, Byrne *v.*
Schofield, Kenworthy *v.*
—— Rafferty *v.*
School for the Indigent Blind,
Nethersole *v.*
——
Wigsell *v.*
School Board for Harrogate,
Kirby *v.*
—— London,
Bolton *v.*
—— *Re*
Collins'
Trustees and.
—— *Re*
Peck and.
Schroeder, Fruhling *v.*
—— Henty *v.*
Schwepes, Ltd., Godwin *v.*
Scotcher, Pearce *v.*
Scott, Adams *v.*

Scott, Commins *v.*
—— Hoggart *v.*
—— Manby *v.*
—— Partridge *v.*
—— Vickers *v.*
—— Williams *v.*
Scottish Union Insurance Co.,
Simpson *v.*
Scrutton, Le Vasseur *v.*
Scrughan, Tardiffe *v.*
Scully, Archbold *v.*
Seacombe, Holliwell *v.*
Seadon, *Re* Stuart and Olivant and.
Seaford Corporation, Crook *v.*
Seagrim, Gibson *v.*
Seale Hayne, Whittington *v.*
Sealey, Sergeson *v.*
Seamore, Martin *v.*
Sear, Davies *v.*
Sebright, Calvert *v.*
—— Scott *v.*
Seddon, Aspdon *v.*
Sefton (Earl of), Att.-Gen. *v.*
Selborne (Earl), Att.-Gen. *v.*
Selmes, Langford *v.*
Selmon, *Re* Baker and.
Senbecutty Vaigalie, Sastry,
&c. *v.*
Sendall, Harington *v.*
Senior, Higgins *v.*
Sevin, Green *v.*
Sewell, Ashburner *v.*
—— Brown *v.*
—— Cole *v.*
Sexton, Dawson *v.*
—— *Re* Burroughs, Lynn and.
Seymour, London and Provincial
Insurance Co. *v.*
Shacklock, Harpham *v.*
Shaftesbury (Earl of), Lewers *v.*
Shakspear, Sherwin *v.*
Shalleross, Roffey *v.*
Sharp, Carrodus *v.*
—— Hamer *v.*
—— West Ham Corporation *v.*
Sharpe, Clay *v.*
Shaw, Caudell *v.*
—— Howard *v.*
—— Morgan *v.*
—— Read *v.*
Sheard, Sykes *v.*
Shearly, Skeeles *v.*
Shebbeare, Tillard *v.*
Sheldon, Du Hourmelin *v.*
Shephard, Riseley *v.*
Sherborne (Lord), Pickering *v.*
Shergold, Pool *v.*
—— Reid *v.*
Shippam, Hewlins *v.*

- Shitta, Montaigne *v.*
 Shore, Duke of St. Albans *v.*
 Short, Rourke *v.*
 — Siddons *v.*
 — Trustees, Executors and Agency Co. *v.*
 Shortall, Mortimer *v.*
 Shotbolt, Goodrick *v.*
 Shrewsbury and Birmingham Rail. Co., Johnson *v.*
 Shutt, Ballard *v.*
 Sibthorp, Att.-Gen. *v.*
 Sibun, *Re* Starr Bowkett Building Society and.
 Siddal, Life Association of Scotland *v.*
 Silber, Carter *v.*
 Silkstone and Haigh Moor Coal Co., Wheatley *v.*
 Silva, Tilbury *v.*
 Silvester, Phillips *v.*
 — Richardson *v.*
 Simcox, Att.-Gen. *v.*
 Sime, Graham *v.*
 Simmonds, Knight *v.*
 Simonds, Eyston *v.*
 Simons, Cutler *v.*
 Simpson, Duddell *v.*
 — Mitchell *v.*
 — Vawdrey *v.*
 Sims, Coles *v.*
 Sinclair, Daniell *v.*
 Singer, Carr *d.* Dagwell *v.*
 — Manufacturing Co., Moore, Nettlefold & Co. *v.*
 Singleton, Day *v.*
 Sittingbourne and Sheerness Rail. Co., Att.-Gen. *v.*
 Sitwell, Att.-Gen. *v.*
 — Ommaney *v.*
 Skelton, Robertson *v.*
 Sketcher, *Re* Judd and Poland and.
 Skinner, Allcard *v.*
 — Corporation of the Sons of the Clergy *v.*
 Slade, England *d.* Syburn *v.*
 — Seton *v.*
 Small, Attwood *v.*
 — Bankes *v.*
 — Frontin *v.*
 Smallwood, Matthews *v.*
 — Richardson *v.*
 Smart, British Mutual Investment Co. *v.*
 — Penn *v.*
 — Hooper *v.*
 Smeed, Thames Conservators *v.*
 Smethurst, Rhodes *v.*
 Smith, Adv.-Gen. *v.*
 Smith, Baldwyn *v.*
 — Duke of Beaufort *v.*
 — Birkin *v.*
 — Blackburn *v.*
 — Bleakley *v.*
 — Booth *v.*
 — Bromley *v.*
 — Cubitt *v.*
 — Earl of Egmont *v.*
 — Emuss *v.*
 — Fury *v.*
 — Gabriel *v.*
 — General Auction, Estate and Monetary Co. *v.*
 — Gray *v.*
 — Hartley *v.*
 — Hincksman *v.*
 — Hosking *v.*
 — Howe *v.*
 — James *v.*
 — Jones *v.*
 — King *v.*
 — Lenaghan *v.*
 — Lovesy *v.*
 — Marlow *v.*
 — Martin *v.*
 — Maskelyne *v.*
 — Meux *v.*
 — Midgley *v.*
 — Municipal Permanent Investment Building Society *v.*
 — Pochin *v.*
 — Powell *v.*
 — *Re* Puckett and.
 — R. *v.*
 — Reese River Silver Mining Co. *v.*
 — Richardson *v.*
 — *Re* Rumney and.
 — Seddon *v.*
 — Shapland *v.*
 — Sweetland *v.*
 — Teevan *v.*
 — Turner *v.*
 — Walker *v.*
 — Webb *v.*
 — *Re* White and.
 — Wilmot *v.*
 Smith Marriott, Att.-Gen. *v.*
 Smithies, Hay *v.*
 Smithson, Onward Building Society *v.*
 Smythe, Att.-Gen. *v.*
 Snow, Smith *v.*
 Snowball, Modlen *v.*
 Soady, Poole *v.*
 Soames, Lee *v.*
 Sodor and Man (Bishop of), Vincent *v.*

- Solari, Kelly *v.*
 Soltau, Cooke *v.*
 Somerset (Duke of), Gourlay *v.*
 Sorrell, Williams *v.*
 Sothou, Att.-Gen. *v.*
 Sourton, R. *v.*
 South Eastern and Chatham Rail.
 Cos.' Managing Committee, Cor-
 bett *v.*
 South London Tramways Co.,
 Barnett *v.*
 South Sea Co., Att.-Gen. *v.*
 Southampton Corporation, Har-
 rison *v.*
 Southern, Goodtitle *d.* Radford *v.*
 Southey, Webster *v.*
 Southgate, Chaplain *v.*
 ——— London Corporation *v.*
 Spilsbury, Doe *d.* Burdett *v.*
 Spittle, Bloomer *v.*
 ——— Dartmouth *v.*
 Spitty, Curtis *v.*
 Spofforth, Haldenby *v.*
 Spooner, Phoenix Assurance Co. *v.*
 Spottiswoode, Capper *v.*
 Spratley, Griffith *v.*
 Spreadbury, Little *v.*
 Sprye, Reynell *v.*
 Squier, Gale *v.*
 Stafford (Lord), Corley *v.*
 ——— and Uttoxeter Rail. Co.,
 Earl Ferrers *v.*
 Stallibrass, Want *v.*
 Stanford, Whitmores, Ltd. *v.*
 Staugroom, Marquis Townshend *v.*
 Stanion, Doe *d.* Gray *v.*
 Stanley, Blundell *v.*
 ——— Jones *v.*
 ——— Lobb *v.*
 Stanley Coal Co., Low Moor
 Co. *v.*
 Starr, Sturge *v.*
 States, Vouillon *v.*
 Statham, Joynes *v.*
 Stear, Johnson *v.*
 Steere, Toulmin *v.*
 Steiger, Horsey Estate, Ltd. *v.*
 Stenning, Child *v.*
 Stenson, Bown *v.*
 Stephens, Lord *v.*
 ——— Mann *v.*
 Stephenson, Cooper *v.*
 ——— Esdaile *v.*
 ——— Toft *v.*
 Sterum, Colclough *v.*
 Steven, Forbes *v.*
 Stevens, Dobell *v.*
 ——— Remington *v.*
 ——— R. Wilson and.
 Stevenson, Hesse *v.*
 Stibbert, Taylor *v.*
 Stier, Ford *v.*
 Stimson, Collins *v.*
 Stock, Ashton *v.*
 Stocker, Nelson *v.*
 Stocks, Smith *v.*
 Stogdon, Levy *v.*
 Stohwasser, Mumford *v.*
 Stokes, Armstrong *v.*
 Stone, Bennett *v.*
 ——— Cree *v.*
 ——— Doe *d.* Gaisford *v.*
 ——— Imperial Loan Co. *v.*
 Stoner, *Re* Durrant and.
 Stordy, Rittson *v.*
 Storie, Ball *v.*
 Story, Cloutte *v.*
 Stradling, Wills *v.*
 Strange, Att.-Gen. *v.*
 ——— Price *v.*
 Strathmore (Earl of), Davis *v.*
 Stratton, Piggott *v.*
 Streatfield, *Re* Riley to.
 Street, Gordon *v.*
 Streeten, Hinder *v.*
 Stretton, Nicholls *v.*
 Strobe, Casamajor *v.*
 Struben, Horne *v.*
 Stuart-King, Hyams *v.*
 Studley, Feilder *v.*
 Sturgeon, Burton *v.*
 Suckling, Donald *v.*
 Suffield (Lord), London Freehold
 and Leasehold Property Co. *v.*
 Summersett, Doe *d.* Aslin *v.*
 Sunderland, Coppendale *v.*
 Sussmann, Albrecht *v.*
 Sutcliffe, Cockcroft *v.*
 Sutherberry, Oceanic Steam Navi-
 gation Co. *v.*
 Sutton, Blore *v.*
 ——— Fitch *v.*
 ——— R. *v.*
 Swaine, Hart *v.*
 Swann, Horner *v.*
 ——— Joyce *v.*
 ——— Watson *v.*
 Swansea Urban Sanitary Authority,
 Morgan *v.*
 ——— Beaufort *v.*
 Sweed, Limondson *v.*
 Sweeny, Bank of Montreal *v.*
 Sweetland, Parrott *v.*
 Sweetman, Grimsdick *v.*
 Swift, Matson *v.*
 Swindon Rail. Co., Great Western
 Rail. Co. *v.*
 Swinstead, Taite *v.*

- Swarder, Abbott *v.*
 ——— Adams *v.*
 Sybourne, Doe *d.* Bowerman *v.*
 Syburn *v.* Slade, England *d.*
 Sydney Commissioners, Lord *v.*
 Sykes *v.* Durnford, Doe *d.*
 ——— Wrigley *v.*
 Sylvester, Thomas *v.*
 Symes, Long *v.*
 ——— Watts *v.*
 Symmons, Mackreth *v.*
 Symonds, Beale *v.*
 ——— Davis *v.*
- Table Cape Marine Board, Van
 Diemans' Land Co. *v.*
 Tabrum, Taylor *v.*
 Taff Vale Rail Co., Powell Duffryn
 Steam Coal Co. *v.*
 Tagg, Barsht *v.*
 Talbot, Dicconson *v.*
 Tamer, Kilt Hill and Callington
 Rail Co., D'Arcy *v.*
 Taniere, Doe *d.* Pennington *v.*
 Tannar, Cohen *v.*
 Tanner, Chapman *v.*
 Taouqueray, Hopkins *v.*
 Tasburgh, Viscount Clermont *v.*
 Tate, Withington *v.*
 Tattersall, Stanton *v.*
 Taunton, Adams *v.*
 Taylerson, Doe *d.* Culley *v.*
 Taylor, Allen *v.*
 ——— Bentsen *v.*
 ——— Bourne *v.*
 ——— Cockell *v.*
 ——— Evans *v.*
 ——— *Re* Leyland and.
 ——— Marshall *v.*
 ——— *Re* Mason and.
 ——— Monro *v.*
 ——— Plant *v.*
 ——— Rawstron *v.*
 ——— Whiteley *v.*
 Teal, Bramley *v.*
 Telling, Doe *d.* Whatley *v.*
 Temperance Permanent Building
 Society, Brocklesby *v.*
 Temple, Crump *v.*
 ——— Hudson *v.*
 ——— Palmer *v.*
 ——— Sutton *v.*
 Templeman *v.* Martin, Doe *d.*
 Tenant, Hearne *v.*
- Tenant, Lightfoot *v.*
 Terry, Liles *v.*
 Tetley, *Re* Clay and.
 Teynham (Lord), Head *v.*
 Thames Conservators, Stewart *v.*
 ——— Haven Dock and Rail. Co.,
 Brymer *v.*
 Thanet (Earl of), Milward *v.*
 Tharp, Wingfield *v.*
 Theatres, Ltd., Stevens *v.*
 Theobald, Att.-Gen. *v.*
 Thimbleby, Shears *v.*
 Thomas, Horsfall *v.*
 ——— Sims *v.*
 ——— Mayor of Swansea *v.*
 ——— Tilley *v.*
 ——— *Re* Weston and.
 Thompson, Carlisle Banking
 Co. *v.*
 ——— Cato *v.*
 ——— Doe *d.* Downe *v.*
 ——— *Re* Hargreaves and.
 ——— *Re* Ringer to.
 ——— *Re* Royal Society of
 London and.
 ——— Smith *v.*
 Thomson, Kearley *v.*
 ——— Simpson *v.*
 Thornhill, Flureau *v.*
 Thornton, Brigg *v.*
 Thorold, Parkin *v.*
 Thurlstone, R. *v.*
 Tibbitts, Darrell *v.*
 Tickell, Townson *v.*
 Tidy, *Re* Ebsworth and.
 Till, Coslake *v.*
 Timbrell, Spackman *v.*
 Tite, Cuddon *v.*
 Tod, Inland Revenue Commis-
 sioners *v.*
 Todd, Brady *v.*
 ——— Kirk *v.*
 Todmorden Mill Co., Ormerod *v.*
 Tofield, Doe *v.*
 ——— Greaves *v.*
 Tollemache, Davis *v.*
 Tomkins, Lloyd *v.*
 Tomkinson, Balkis Consolidated
 Co. *v.*
 ——— Nottingham Guar-
 dians *v.*
 Tomline, Att.-Gen. *v.*
 Tompson, Leslie *v.*
 Toogood, Crawford *v.*
 Tooke, Crosbie *v.*
 Toone, Watson *v.*
 Tootal, Parker *v.*
 Topham, Maw *v.*
 ——— Spencer *v.*

- Topp, Ellen *v.*
 Torkington, Wilkinson *v.*
 Tottenham and Hampstead Junction Rail. Co., Wing *v.*
 Towell, Isaacs *v.*
 Tower Galvanizing Co., Duck *v.*
 Town Properties Investment Corporation, Davis *v.*
 Townsend, Pertwee *v.*
 Towse, Gaslight and Coke Co. *v.*
 Tracy, Drummond *v.*
 Trail, Perring *v.*
 Tranter, Finck *v.*
 Travers, Miller *v.*
 Trecothick, Coles *v.*
 Treharne, Davies *v.*
 Treherne, Hubert *v.*
 Trenchard, Tennant *v.*
 Trevanion, Walsh *v.*
 Trevelyan, Charter *v.*
 Trevor, Robinson *v.*
 — Sellick *v.*
 Trevor-Garrick, Stevens *v.*
 Trewby, Cooper *v.*
 Trimble, Slator *v.*
 Trimmen, Randell *v.*
 Trinder, Mullings *v.*
 Tripp, Sibree *v.*
 Truefitt, Ltd., Cowen *v.*
 Trumper, Brown *v.*
 Truro Rural Council, Harvey *v.*
 Truscott, Carlyon *v.*
 Trustees of Hollis' Hospital, *Re*
 Hague and
 — Executors and Securities
 Insurance Corporation, Imperial
 Ottoman Bank *v.*
 Tubb, Harris *v.*
 Tubbs, *Re* Mayor of London and.
 Tucker, Bellairs *v.*
 — Pemsel *v.*
 — Roberts *v.*
 Tunbridge Wells Improvement
 Commissioners, Goldsmid *v.*
 Turley, Lavery *v.*
 Turner, Chadwick *v.*
 — Chasemore *v.*
 — Gas Light and Coke Co. *v.*
 — Greenwood *v.*
 — Hubert *v.*
 — Jacomb *v.*
 — and Somerville, *Re.*
 — Strickland *v.*
 — Tuer *v.*
 Turquaand, Oakes *v.*
 — Ricketts *v.*
 — Royal British Bank *v.*
 Tustin, *Re* Johnson and.
 Tuton, Leaf *v.*
 Tweedy, Evans *v.*
 Tyrwhitt, Wynne *v.*
 Tysson, Truell *v.*
 Ulleswater Steam Navigation Co.,
 Marshall *v.*
 Underwood, Savory *v.*
 Union of London and Smiths
 Bank, Ponsford *v.*
 United Guarantee and Life Assur-
 ance Co., Myers *v.*
 ——— Hand-in-Hand and Band of
 Hope Co., National Bank
 of Australia *v.*
 ——— Kingdom Telegraph Co.,
 R. *v.*
 ——— Telephone Co., Wands-
 worth Board of Works *v.*
 Universal Marine Assurance Co.,
 Morrison *v.*
 ——— Stock Exchange, Ltd.,
 Strachan *v.*
 Upjohn, Mainland *v.*
 Upsall, Hickman *v.*
 Upton, Att.-Gen. *v.*
 — Welcome *v.*
 Usborne, Economic Life Assurance
 Society *v.*
 Uxbridge and Rickmansworth Rail.
 Co., *Re* Harman and.
 Vade, Bennet *v.*
 Vagliano, Bank of England *v.*
 Valentini, Staffordshire Financial
 Co. *v.*
 Vandeleur, Att.-Gen. of Ireland *v.*
 Vanderplank, Wright *v.*
 Van Joel, *Re* Nichols and.
 Van Tienhoven, Byrne *v.*
 Vardill, Birtwhistle *v.*
 — Doe *d.* Birtwhistle *v.*
 Varley, Smedley *v.*
 Varna Rail. Co., Crampton *v.*
 Vaughan, Evans *v.*
 — Jenkins, Ingle *v.*
 — Sherrin Engineering Co.,
 Hamilton *v.*
 Vause, Drant *v.*
 Vaux (Lord), Otter *v.*
 Vawdrey, Seaman *v.*
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